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Supreme Court of the United States

OCTOBER TERM, 1954

No. 50

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO., PETITIONER,

vs.

INLAND WATERWAYS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 26, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

No. 910

JOSEPH A. BISSO, Receiver of New Orleans Coal & Bisso Towboat Company

versus

INLAND WATERWAYS CORP.

ADMIRALTY

APPEARANCES:

Deutsch, Kerrigan & Stiles (Francis Emmett, Esq.)
Phelps, Dunbar, Marks & Claverie, Attorneys for Libellant-Appellant.
George R. Blue, Esq., United States Attorney
M. Hepburn Many, Esq., Asst. U. S. Attorney, Attorneys for Respondent-Appellee.

[fol. 2] LIBEL—Filed May 12, 1945

The libel of Joseph A. Bisso, duly appointed, qualified and confirmed receiver of New Orleans Coal & Bisso Towboat Company against Inland Waterways Corporation, in a cause of action, civil and maritime, with respect represents:

I

Libelant is, and at all the times hereinafter mentioned was, the duly appointed, qualified and confirmed receiver of New Orleans Coal & Bisso Towboat Company which was at all material times, the owner of the steel oil barge Bisso #9, which barge, at all material times was under charter to National Oil Transport Corporation.

II

Respondent is a corporation organized and existing under the laws of the United States, the capital stock of

which is owned entirely by The United States of America, and has an office for the transaction of business within the Eastern District of Louisiana. Respondent owns and operates tugboats and towing steamers, amongst other floating equipment, on the Mississippi River and its tributaries, and was and is doing business as a common carrier for hire and as a common tower for hire, under the trade name of Federal Barge Lines. As such, at all the times hereinafter mentioned respondent owned and operated the steam towboat Cairo.

III

Pursuant to its business as a common carrier and common tower for hire, respondent undertook and agreed with [fol. 3] the aforesaid charterer to tow the said steel oil barge Bisso #9 from New Orleans, Louisiana, to Cairo, Illinois.

Said steam towboat Cairo took said Bisso #9 in tow and proceeded up the Mississippi River. While attempting to navigate under the highway bridge spanning the Mississippi River in the vicinity of Greenville, Mississippi, on or about May 12, 1944, the Cairo brought the Bisso #9 into collision with a pier of said bridge, and, as a result thereof, said Bisso #9 was wrecked and beached and became a total constructive loss, having only a junk salvage value.

The said Bisso #9, at the time of said occurrence, had no motive power, no steering gear or steering apparatus, and was unmanned. Said barge was wholly and entirely in the custody and under the control of respondent and the steam towboat Cairo.

The said barge, at the commencement of said voyage was, in every way, seaworthy and properly trimmed, and was in no way accountable for said collision and damage; said collision and the resulting damage were due wholly and solely to the fault of the pilot, master and crew of the said steam towboat Cairo in negligently causing and permitting the said barge to come into contact with the said bridge, and to the fact that the said steam towboat Cairo was unseaworthy for said towage operation, in that she was underpowered and in that her steering apparatus was defective and insufficient for the purpose of said towage, and in that she was not the proper type of vessel either in

design or construction to perform said towing operation, [fol. 4] and in that she was endeavoring to handle a tow which was too large and cumbersome for said towage operation, and for the particular maneuver of passing under said highway bridge, and more particularly in that she failed to break up her tow and navigate under the bridge with various portions of her tow at various times, instead of endeavoring to bring the entire tow under the bridge at one time.

IV

By reason of the premises libelant has sustained damage in the sum of Thirty-five Thousand and no/100 ($35,000.00) Dollars less Eighteen Hundred and no/100 ($1800.00) Dollars, the highest bid obtained for the said wreck after due solicitation of bids for same, or a net loss of Thirty-three Thousand, Two Hundred and no/100 ($33,200.00) Dollars.

V

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that:

(1) Respondent be duly cited to appear and answer on oath all and singular the matters aforesaid;

(2) that after due proceedings had, the court will order, adjudge and decree that respondent pay to your libelant the damages suffered by it, together with interest thereon, and its costs and disbursements;

[fol. 5] (3) and that your libelant have such other and further relief in the premises as in law and justice it may be entitled to receive.

(S.) Deutsch, Kerrigan & Stiles, Phelps, Dunbar, Marks & Claverie, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 21, 1947

Now comes Inland Waterways Corporation, respondent herein, and for answer to the said libel, respectfully shows:

I

Respondent is without sufficient information to justify a belief that the allegations of Article I of the libel are true, and therefore, same are denied, and libellant put to strict proof thereof.

II

The allegations of Article II of the libel are admitted, except that it is not a common tower for hire, but is a private contract tower.

[fol. 6]

III

The allegations of Article III of the libel are denied, except as hereinafter specifically admitted.

IV

The allegations of Article IV of the libel are denied.

V

Respondent admits the admiralty jurisdiction of this Honorable Court; but denies the allegations of the libel are true and correct, and avers that the full truth will only be found herein.

Further answering, respondent shows:

VI

Respondent is not now, nor has ever been, at any of the times stated in the libel, a common tower or carrier of privately-owned barges for hire between New Orleans, Louisiana and Cairo, Illinois, nor between any other ports on any waterways whatsoever. Respondent acted solely and exclusively as a private tower, and its agreements were subject to such terms and conditions as respondent might lawfully impose upon the contemplated undertakings;

which terms and conditions were fully understood by the owners of the barges to be towed and formed an integral part of the agreements to tow barges.

Respondent shows that as a private tower it was under no duty or obligation to transport the property or barges of libellant between any termini and that every such [fol. 7] undertaking was subject to the terms and conditions which it might, as such private tower, lawfully impose upon and make a part of the agreement for performance of such service.

Respondent further shows that, as a private tower, it would not have undertaken to transport the barge in question unless the owner of the barge, acting through authorized representatives, had agreed to and acquiesced in the terms and conditions under which the respondent undertook to tow the barge or barges to be transported from place to place.

VII

Further answering, and as a separate and special defense, respondent avers that the circumstances attending its agreement to tow Barge Bisso 9. from New Orleans, Louisiana, to Cairo, Illinois, as stated in the libel, were as follows:

On December 1, 1943, Mr. A. W. Frey, of the National Oil Transportation Corporation, charterer of Barge Bisso 9, entered into a blanket towage agreement with the Inland Waterways Corporation, through its former President, Mr. Chester C. Thompson, whereby the Inland Waterways Corporation, agreed to tow certain named barges, including Bisso 9, for account of the libellant, from time to time, and subject to the terms and conditions as set forth in Inland Waterways Corporation, doing business as the Federal Barge Lines, towage contract and towage release form, copies of which were attached to and made a part of said agreements. For greater certainty and more particular reference, there is annexed hereto and made a part hereof [fol. 8] (marked for identification purposes, Respondent's Exhibit A), original agreement signed and documents attached.

Respondent avers that in signing and executing the documents annexed, libellant, through its authorized agents,

servants, employees, and respresentatives, was fully aware, cognizant and informed of the terms and conditions under which the services were arranged and actively solicited that service, subject to respondent's terms.

Respondent pleads the provisions of said agreement and release (Exhibit A), in bar of libellant's right or cause of action against this respondent.

VIII

Further answering, and as a separate and special defense, respondent avers that the Steamer Cairo was at all times mentioned in the libel stout, staunch, strong and seaworthy in every respect; was properly provisioned, fitted, tackled and apparelled, carrying a full complement of competent licensed officers and crew. Respondent specially avers that said steamer Cairo was fully and efficiently powered; the steering gear was in every respect proper, fit and capable; and the Steamer Cairo was by design and construction fully able to handle Barge Bisso 9 in all circumstances attending the incident to the towing of said barge from one place to another on the navigable rivers of the United States.

IX

Further answering, and as a separate and special defense, [fol. 9] respondent avers that nothing which its agents, servant or employees did or failed to do in any respect, caused or contributed to the incident described in the libel.

X

Further answering, and as a separate and special defense, respondent avers that under the terms and provisions of the contract entered into between the respondent and the libellant, the officers and crew of the Steamer Cairo became and were at all times during the performance of the contract, the servants and employees of the libellant herein and any act of omission or commission on their part constituted negligence in law, was and is the negligence of their employer, and this respondent is not liable therefor.

XI

Further answering, and for a separate and special defense, (to be invoked only if the above and foregoing pleas and defenses are not sustained), respondent avers:

When approaching the Greenville, Mississippi Bridge, the steamer Cairo being then stout, strong and capable and in all respects fit and seaworthy and properly manned; the tow properly arranged and secure according to good custom of navigation on the Mississippi River; its navigators being alert and vigilant to effect a proper and safe passage through the river bridge; the steamer was properly maneuvered into position for proper and safe transit when sudden, heavy boils along with the strong current, pushed the tow up against the pier of said bridge, and the starboard stern of Barge APL 102 struck the said pier; the port [fol. 10] coupling on Bisso 9 broke and certain damage was caused to Barge Bisso 9. Respondent shows that nothing which the navigators of the Cairo did or failed to do caused or contributed to the collision but that it resulted solely, only and inevitably from an inscrutable fault or an act of God over which the owner, operator and navigators and crew of the steamer had no control. Respondent avers that it was not at fault for the occurrence above described and there was nothing which it could have done to prevent the collision.

Respondent reserves the right to amend this answer, as, and if, additional defensive facts are revealed in the course of its investigation, making such amendment proper and necessary. And respondent further reserves the right, in the event that the Court should find that the libellant, Joseph A. Bisso, duly appointed, qualified and confirmed Receiver of New Orleans Coal & Bisso Towboat Company, is entitled to a decree in any amount against respondent, to proceed against the National Oil Transportation Corporation in like amount.

Wherefore, respondent prays that after due proceedings had, there be a decree in its favor and against the libellant

dismissing the libel at libellant's cost and for all general relief.

[fol. 11] (S.) A. L. Ponder, Jr., Assistant United States Attorney; Cyrus C. Guidry, Attorney, Inland Waterways Corporation, Proctors for Respondent.

RESPONDENT'S EXHIBIT "A" TO ANSWER

Federal Barge Lines
Operated by
Inland Waterways Corporation

New York, New York, November 29, 1943.

National Oil Transport Corporation
30 Rockefeller Plaza
New York, New York.

Gentlemen:

This confirms agreement reached with Mr. A. W. Frey in his office on November 29th, whereby the Federal Barge Lines, operated by the Inland Waterways Corporation, will tow, until further notice, petroleum barges owned or controlled by your Corporation, as a private carrier by water, on the Mississippi and Illinois Rivers, effective December 1st, 1943, on the following basis:

Northbound loaded—2.2 mills per net ton mile.

Southbound loaded—1.5 mills per net ton mile.

Northbound empty barges—up to 175 feet in length, 40 cents per mile; 175 to 200 feet in length, 55 cents per mile; 200 feet and over in length, 80 cents per mile.

Southbound empty barges—up to 175 feet in length, 30 cents per mile; 175 to 200 feet in length, 40 cents per mile; [fol. 12] 200 feet and over in length, 60 cents per mile.

The above rates are predicated on all loaded barges being loaded to approximate capacity, and in no event not less than 500 net tons per barge. Mileages are to be based upon and calculated on the 1942 United States Coast Guard Light List. It is further understood that all loaded barges will

be subject to a minimum charge of 25 cents per net ton, and the movement of empty barges to a minimum of $50.00 per barge.

It is further understood that the above rates and conditions shall not apply to barges loaded prior to December 1st, 1943.

It is assumed your Corporation will cause to be executed in its behalf the necessary Towing Contract and Releases prior to the movement of any barges under the above terms.

Yours very truly, (S.) H. E. Ruddiman, General Traffic Manager.

Accepted:

National Oil Transport Corporation, New York, New York. By (S.) A. W. Frey. Date ——.

Memorandum of agreement made and entered into this 1st day of December, 1943, by and between the Inland Waterways Corporation, operating the Federal Barge Lines (hereinafter called "Federal Barge Lines") and the National Oil Transport Corporation, with offices in New York, New York.

Witnesseth:

Whereas, the National Oil Transport Corporation contemplates that from time to time it will employ the Federal [fol. 13] Barge Lines to perform towage service in the movement of National Oil Transport Corporation's barges viz: LTC 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, WT 3, 4, 5, 6, DC 1451, EBL 11, 12, Bisso 9 DPC 424-X, 431-X, 432-X, 433-X, 412-X, 455-X, 494-X, DPC 20-Inland, DPC 31-Inland, 65-Inland, 113-UBL, CSVX 1, 2, 3, 4, 5, 6, 7, 8.

Whereas, the parties desire to fix the terms and conditions under which such towage service will be performed in each case, applicable if and whenever one or more of the barges listed above is accepted by the Federal Barge Lines for towage,

Now, therefore, in consideration of the premises and the mutual covenants hereinafter contained, the parties agree as follows:

1. The parties agree that the terms and conditions set forth in Federal Barge Lines' standard form of Towage

Contract and Federal Barge Lines' form of Towage Release, copies of which are attached hereto marked respectively Exhibits A and B, and made a part hereof, shall apply with respect to each and every towage service performed on barge numbers previously listed herein, when tendered by National Oil Transport Corporation and accepted for towage by Federal Barge Lines.

2. The terms of the Agreement shall remain in full force and effect until cancelled by either party which cancellation may be accomplished by fi-teen (15) days' written notice, provided that any cancellation shall not apply to any barge then enroute after acceptance thereof by Federal Barge Lines.

[fol. 14] 3. The rates to be charged by Federal Barge Lines for the performance of such towage are subject to negotiation and agreement in each particular case.

4. Federal Barge Lines will cooperate with National Oil Transport Corporation in developing facts of any accident resulting in damage to any barge of National Oil Transport Corporation or to its cargo, and will endeavor to furnish National Oil Transport Corporation with such information as it may have.

In witness thereof, the parties hereto have executed this contract by their officers or agents therein duly authorized.

Inland Waterway, Corporation Operating the Federal Barge Lines. By (S.) Chester C. Thompson.

Attest:

(S.) Gary Bantey, Secretary-Treasurer.

National Oil Transport Corporation. By (S.) A. W. Frey.

Attest:

(S.) S. T. Foote.

[fol. 15] EXHIBIT A

FEDERAL BARGE LINES

Towage Contract

The Inland Waterways Corporation, operating the Federal Barge Lines, hereinafter called "Federal Barge Lines", agrees to tow the following craft, hereinafter designated as the "craft to be towed" upon the terms and conditions hereinafter set forth when accepted and agreed to by the owner of the "craft to be towed" as evidenced by acceptance endorsed at the foot hereof, to-wit:

(1) The service above mentioned rests alone upon this contract and neither Federal Barge Lines nor its boats or servants shall be held, in any way, to common carrier liability.

(2) This towing contract having been entered into without inspection by Federal Barge Lines of "craft to be towed", it shall be null and void, and Federal Barge Lines shall be under no obligation hereunder, if, in the judgment of the master of the tow, the "craft to be towed", or any part thereof, is unseaworthy, or for any reason would constitute a risk or hazard to the tow, and/or in case any misstatement has been made in giving a description of the "craft to be towed"; provided that nothing herein contained shall impose any duty upon Federal Barge Lines, its agents, servants or employess to inspect the "craft to be towed" or make any one of them liable for damage resulting from failure to make such an inspection or resulting from any error of judgment in making the inspection.

(3) The "craft to be towed" will be moved only at the convenience of Federal Barge Lines and not by any particular tow, and Federal Barge Lines reserves the right to change "craft to be towed" from one to another of its tows as frequently as it may find it convenient to do so.

(4) The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo and neither the boats and/or any other equipment used in said service nor the owner, charterer, or hirer thereof shall be liable for any loss or damage to the "craft to be towed" or its cargo nor for any damage done by the "craft to be towed", however occurring. The masters and crews and employees

of all boats and/or other equipment assisting the "craft to be towed" shall, in the performance of said service, become and be the servants of the "craft to be towed", regardless of whether the "craft to be towed" assists in the service in any way and irrespective of whether they be aboard the "craft to be towed" or in command thereof. Nothing herein contained, however, shall be construed as making the "craft to be towed", its owners, charterers or operators liable or responsible for loss of or damage to the property of Federal Barge Lines or third parties or for loss of life or personal injury for which the "craft to be towed" its owners, charterers or operators would not otherwise be liable or responsible.

(5) "Owner" agrees to indemnify and hold harmless Federal Barge Lines from any liability to or for account of the crew of the "craft to be towed" because of any accident, damage, injury or loss of life to the said crew, or any loss of personal property or effects of the said crew, however arising, and the "owner" agrees to defend any and all suits or other actions which may be brought against Federal Barge Lines by or for account of the members of such crews for the reasons aforesaid, and to pay, satisfy, or [fol. 16] discharge any and all judgments that may be rendered therein, to the full acquittance and discharge of Federal Barge Lines.

(6) Whenever the Inland Waterways Corporation, operating the Federal Barge Lines, uses a chartered towboat in the performance of this Towing Contract, all of the convenants and exemptions from liability herein provided or applicable to the Inland Waterways Corporation, operating the Federal Barge Lines, shall also be applicable to said chartered towboat, its Owner, the Agents of the Owner and their servants and employees.

(7) Whether or not the "owner subscribes an acceptance at the foot hereof, the delivery of the "craft to be towed" to Federal Barge Lines, its agents, servants and employess shall constitute an acceptance of all of the terms and conditions of this contract.

Accepted: . By . Date

: Inland Waterways Corporation, Operating the Federal Barge Lines, By . Its Agent.

Exhibit B

Federal Barge Lines

Towage Release

194

Received from (hereinafter referred to as "owner") Craft No. or name (hereinafter referred to as "craft to be towed"). dimensions

Draft of Barge

Bow		Stern			Bow		Stern	
Ft.	In.	Ft.	In.		Ft.	In.	Ft.	In.
Port				Starboard				

to be towed by the Inland Waterways Corporation, oper- [fol. 17] ating the Federal Barge Lines,

From .....

To .....

in accordance with Towing Contract No. —— 194—, and/or Towage Tariff No.—— 194— and Supplements thereto and Reissues thereof.

Inland Waterways Corporation
Operating the
Federal Barge Lines

Accepted:

By .....
Its Agent

.....
Owner

By .....

Date .....

(This form to be used to cover each and every towage service performed)

In the United States District Court

Interrogatories Propounded by Respondent to Libellant —Filed: May 25, 1953

1. State the date, type, terms, conditions, rental and location of arrangement or agreement between libellant and the National Oil Transport Corporation in connection with

Bisso No. 9. Please attach to your answers to these interrogatories the agreement or copy thereof.

2. Was this arrangement or agreement oral or in writing.

3. If oral, by whom was it made on the part of libellant, and by whom on the part of National Oil Transport Corporation.

4. Who is in possession of the written agreement, if such was made.

[fol. 18] 5. Under the arrangement or agreement, between the libellant and National Oil Transport Corporation, did libellant give exclusive control over Barge No. 9 to National Oil Transport Corporation.

(a) If exclusive control was not given, state the extent of control granted.

(b) By whose employees was the barge to be manned.

(c) Did the National Oil Transport Corporation have the authority to enter into contracts of towage for Barge No. 9.

(d) Was Libellant aware of the fact that National Oil Transport Corporation had contracted with respondent for the towage of Barge No. 9.

(e) Was libellant aware of the fact that National Oil Transport Corporation had entered into a held-harmless agreement with respondent.

(f) If so, give the date, the name of the person who learned this information and his position with libellant.

(g) Did libellant authorize National Oil Transport Corporation to enter into a hold-harmless agreement.

6. What was the rate of pay at which the arrangement was made between libellant and National Oil Transport Corporation.

7. Did libellant have a contract of insurance covering the Barge No. 9.

(a) Give the name of the company, the policy number, the date of the policy, and the type and extent of coverage thereon.

8. Was any money paid by such insurance company to libellant.

(a) The amount.
(b) The date.

[fol. 19] 9. Was any agreement, including subrogation and loan for use entered into between the insurance company and libellant. If such an agreement was entered into, in whose possession is it located. Please append a copy of any such agreement to your answers to these interrogatories.

10. Was the amount paid by check or in cash, and give the name of the person in whose possession the check is located.

11. Please attach a copy of the policy of insurance to your answers to these interrogatories.

(a) In whose possession is the original policy located.

12. Did payment of policy by insurance company to libellant represent the total liability of insurance company to libellant.

(S.) Francis A. Ledet, Assistant United States Attorney Proctor for Respondent.

In United States District Court

Exceptions to Interrogatories Propounded by Respondent —Filed: May 27, 1953

Libelant, Joseph A. Bisso, through its undersigned proctors of record excepts to Interrogatories 1 through 12, propounded by respondent, on the following grounds:

1. Although this case is nine years old respondent has waited until six days before trial to file its inter-[fol. 20] rogatories thus precluding libelant its full fifteen days within which to answer as provided by the Admiralty Rules of the Supreme Court of the United States (Rule 31). Libelant therefore submits

that respondent should not be permitted to propound interrogatories at this late date.

2. Interrogatories 1 through 6 are irrelevant and immaterial as they seek information concerning the charter of the Steel Tank Barge BISSO #9 to National Oil Transport Corporation, who is not a party to this suit, and the answers to said interrogatories can in no way affect the outcome of this litigation since libelant was not a party to the contract of towage between respondent and National Oil Transport. *The West Eldara, 1939 AMC 877, 828 CA 2: The Neils R. Finsen 1931 AMC 1014, 1018 (SD NY).*

3. Interrogatories 7 through 12 are irrelevant and immaterial as they are designed to elicit information concerning libelant's insurance on the Steel Tank Barge BISSO #9 for the purpose of showing that this suit has not been brought by the real party in interest. Although the question of real party in interest is opened to some extent on the civil side of the court it has been set at rest in admiralty.

> "The mere payment of a loss by the insurer does not indeed afford any defense, in whole or in part to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured."

[fol. 21] *The Potomac, 105 US 630, 634 (1881). To the same effect, The Admiral Fiske, 1929 AMC 1130, 1132 (WD Wash.) aff'd., 1930 AMC 1220 (C.A. 9), cert. den. 282 US 874.* This principle applies *a fortiori* when the underwriters' payment has been made under loan receipt, *The Plow City, 1941 AMC 1564, 1568 (CA 3), cert. den., 315 US 798.*

s/Deutsch, Kerrigan & Stiles, Proctors for Libelant.

To: Francis A. Ledet
Assistant United States Attorney
U.S. Post Office Building
Proctor for respondent

Please take notice that the undersigned will bring the above exceptions on for hearing before this Court, at the

U.S. Post Office Building in New Orleans, on Wednesday, May 27, 1953, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

s/James Garrison to Deutsch, Kerrigan & Stiles, Proctors for Libelant.

CERTIFICATE OF SERVICE

(Omitted in printing)

[fol. 22] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING ON EXCEPTIONS, ETC., ARGUMENT & ORDER—May 27th, 1953

Wright, J:

This cause came on this day to be heard on motion of libellant to require further answers and for production of documents and papers; etc.

Present: James Garrison, Attorney for libellant; Francis A. Ledet, Asst. U. S. Attorney.

After hearing argument of counsel for the respective parties:

It is ordered that the motion of libellant to require further answers be, and the same is hereby, granted as to interrogatories Nos. 4, 9 and 13.

It is further ordered that the motion for production of documents be, and the same is hereby, denied.

It is further ordered that the exceptions of libellant to interrogatories of respondent be and the same is hereby overruled as to 1-6 and maintained as to 7-12.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF CASE CALLED, HEARING AND CONTINUANCE —June 1st, 1953

Wright, J:

This cause was this day called for trial.

Present: Frank Emett, Proctor for libellant; Francis Ledet, Asst. U. S. Attorney;

Witness for libellant:

[fol. 23] Daniel Joseph Quinn, sworn by clerk and, after hearing evidence and testimony on behalf of libellant, proctor rested.

Proctor for respondent moved the Court for a a dismissal, said motion was overruled.

Witness for respondent:

Edward A. Rucker, sworn by clerk
Sam Tithen, sworn by clerk
Earl K. Walker, sworn by clerk

and, after hearing evidence and testimony on behalf of the respondent, proctor rested; proctor for libellant also rested.

Proctors for the respective parties are to submit proposed Findings of Fact and Conclusions of Law by June 11th, 1953.

Proctor for respondent moved the Court for a dismissal; and the Court continued the matter until Friday, June 5th, 1953 at 9:55 a. m.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF FURTHER HEARING & SUBMISSION—June 5th, 1953

Wright, J:

This cause as continued from Monday, June 1st, 1953 was this day resumed.

Witness for plaintiff:

William A. Bisso, sworn by dy. clerk and, after hearing evidence and testimony on behalf of the plaintiff, the matter

[fol. 24] was submitted and the Court took time to consider. Proctors are to present Findings of Fact and Conclusions of Law by June 25, 1953.

IN UNITED STATES DISTRICT COURT

ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENT—Filed—June 5, 1953

1. Libelant bareboat chartered the new, unmanned, Steel Barge BISSO #9 to National Oil Transport Corporation by written contract on September 15, 1941. Thereafter the original charter was extended until the date the BISSO # 9 sank. A duplicate original of the charter is attached hereto which sets out all of the terms of the charter.
2. The charter party was in writing.
3. The charter party was not oral.
4. The duplicate original is attached hereto.
5. No.

(a) There were certain rights withheld from the charter, such as a restriction on the type cargo to be carried, the waters to be navigated, etc.
(b) The BISSO #9 was an unmanned tank barge.
(c) Yes.
(d) No.
(e) No.
(f) No answer is required.
(g) No.

6. Eleven hundred and 00/1000 ($1,100.00) per month.

[fol. 25] By (S.) W. A. Bisso, President, New Orleans Coal and Bisso Towboat Company.

Duly sworn to by W. A. Bisso, jurat omitted in printing.

[fol. 26] RESPONDENT'S EXHIBIT 4 TO ANSWERS TO INTERROGATORIES

Filed: June 5, 1953

INLAND WATERWAYS CORPORATION
Operating The
FEDERAL BARGE LINES

———— 193—

Received from ——— (hereinafter referred to as "owner") Craft No. or named ———— (hereinafter referred to as "craft to be towed"), dimensions ————, Draft ———, Loaded ——, Light ——, to be towed by the Federal Barge Lines, from ———— to ————.

The Federal Barge Lines agree to tow the above mentioned craft under the terms and conditions shown below.

(1) The service above mentioned rests alone upon this contract and neither Federal Barge Lines nor its boats or servants shall be held, in any way, to common carrier liability.

(2) This towing contract having been entered into without inspection by Federal Barge Lines of "craft to be towed," it shall be null and void, and Federal Barge Lines shall be under no obligations hereunder, if, in the judgment of the master of the tow, the "craft to be towed," or any part thereof, is unseaworthy, or for any reason would constitute a risk or hazard to the tow, and/or in case any misstatement has been made in giving a description of the "craft to be towed."

(3) The "craft to be towed" will be moved, only, at the convenience of Federal Barge Lines and not by any par-[fol. 27] ticular tow and Federal Barge Lines reserve the right to change "craft to be towed" from one to another of its tows as frequently as it may find it convenient to do so.

(4) The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo and neither the boats and/or any other equipment used in said service, nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the "craft to be towed" or *tis* cargo, nor for any damage done by the "craft to be towed" however occurring.

(5) The masters and crews and employees of all boats and/or other equipment assisting the "craft to be towed" shall, in the performance of said service, become and be the servants of the "craft to be towed" regardless of whether the "craft to be towed" assist in the service in any way and irrespective of whether they be aboard the "craft to be towed" or in command thereof.

(6) "Owner" agrees to indemnify and hold harmless Federal Barge Lines from any liability to or for account of the crew on the "craft to be towed" however arising and the said "owner" assumes full liability for any accident, damage, injury, or loss of life to the said crew on the "craft to be towed" however arising.

(7) And the said "owner" agrees to defend any and all suits or other actions which may be brought by or for account of the members of the crew aforesaid and to pay and sati-fy any and all judgments that may be rendered therein.

[fol. 28] FEDERAL BARGE LINES

By _____

Its Agent

Accepted:

_____

By _____

Date _____

(This form to be used to cover each and every towing service performed)

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 1, 1953

WRIGHT, District Judge:

The issues of fact and law having come on to be heard on the pleadings and proofs of the parties and due delibera-

tion having been had, the court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. On September 15, 1941, New Orleans Coal and Bisso Towboat Company chartered its steel tank barge BISSO #9 to National Oil Transport Corporation for a period of two years, from December 1, 1941, to December 1, 1943. The Charter which was thereafter extended to November 15, 1944, provided:

> "Lessor consents that Lessee may contract to have the barge towed pursuant to a towing contract in substantially the form of the towing contract employed by Federal Barge Lines (Form A194-Rev.) which form of contract contains the following clause:
> [fol. 29] " 'The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo, and neither the boats and/or other equipment used in such service nor the owner, charterer or hirer thereof, shall be liable for any loss or damage to the "craft to be towed" or its cargo, nor for any damage done by the "craft to be towed" however occurring; provided, however, the tug to which this barge may be allocated shall be approved by the Hull Underwriters on the barge.' "

2. On December 1, 1943, National entered into a blanket contract of towage with Federal Barge Lines, whereby Federal agreed to tow a number of National's barges, including the BISSO #9, on the Mississippi River. This contract provided:

> "(4) The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the boats and/or any other equipment used in said service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.
> "The master and crews and employees of all boats and/or other equipment assisting the 'craft to be

towed' shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

3. In early May, 1944, respondent's Towboat CAIRO took in tow, eight loaded barges belonging to various persons, and proceeded up the Mississippi River from New Orleans. Libelant's steel tank barge BISSO #9 was one of the barges, and was bound for Cairo, Illinois, with a cargo of gasoline.

4. The CAIRO'S tow was split up at or near Vicksburg, Mississippi, and moved alternately in groups of four barges, or "double tripped", due to the high waters and dangerous [fol. 30] conditions prevailing in the Mississippi River above that point at that time.

5. The group of four barges here involved was made up at Vicksburg two abreast, and was being pushed ahead of the CAIRO, pursuant to the custom on the Mississippi River. The IWC 240 and IWC 321 were the port and starboard face barges; the BISSO #9 was the port lead barge and the APL 102 the starboard lead barge. The barges were secured to each other and to the CAIRO by means of wires and manila lines.

6. The flotilla arrived in the vicinity of the Greenville Highway Bridge (MAHP 522.3) at approximately 3:00 AM on May 12, 1944 The Mississippi River at this point has a navigable width of some 2200 feet.

7. The Greenville Highway Bridge is constructed on a number of concrete and steel piers, two of which are sunk in the river bottom approximately one-third of the distance from the east and west banks respectively, thus making three spans all of which are navigable during high water. The center span is 800 feet in width and is designated as the "navigation span". The east and west spans are slightly narrower than the center span. Above the Greenville Bridge there was a large submerged sand bar that ran some 600 or 700 feet out from the east bank. This bar created large eddies, or whirlpools, for approximately one-third of the width of the river out from the east bank,

and rendered navigation through the east span dangerous. In the other two-thirds of the river the current flowed swiftly, at approximately seven miles per hour, in the di- [fol. 31] rection of the west bank. In this section of the river there were large "boils" or turbulences in the water making steering extremely difficult. This condition was normal at that point on the river during high water.

8. The CAIRO attempted to pass through the east or right ascending span with her tow, but this maneuver proved unsuccessful because the current was too swift, and an eddy was pulling the tow toward the east bridge-pier. The CAIRO accordingly dropped down-river, out of the east span, approximately 1000 feet below the Greenville Bridge. The pilot and master then attempted to proceed full ahead through the center or navigation span.

9. When the CAIRO and her tow were under the middle of the center span, the flotilla lost all headway. The master and pilot then rang the engine room for emergency full ahead. This signal was answered by the engine room, and the shaft speed was increased four or five revolutions, which accelerated the flotilla's speed through the water thirty-five feet per minute, or less than one-half mile per hour. Shortly after the flotilla's speed was increased, a large "boil" threw the bow of the CAIRO'S tow toward the east bank of the river. To compensate for this movement, the CAIRO'S rudders were put hard left. The flotilla "crabbed" or made leeway to starboard under this maneuver and the port lead barge (APL 102) struck the east pier of the Greenville Bridge abaft her starboard beam. The impact of the collision parted the port coupling wires securing the BISSO #9 and the IWC 240. The BISSO #9 pivoted on the starboard coupling wire, which was [fol. 32] still intact, and was swept up against the east bridge pier where she buckled amidships, turned over and sank.

Conclusions of Law

1. This court has jurisdiction over the subject matter of this action and venue is properly laid in the Eastern District of Louisiana. 28 U.S.C. §1333.

2. When a moving tug brings her "dumb tow" into collision with a stationary object, there is a presumption that

the collison occurred through the negligence of the tug. *The Granite State*, 70 U. S. 310, 314; *The Clarence P. Howland*, 1927 AMC 564 (CCA 2); *The Crown of Galicia*, 232 F. 305 (CCA 2); *The W. H. Gilbert*, 232 F. 547 (CCA 6); *The J. N. Gilbert*, 222 F. 37 (CCA 5); *The Thode Fageland*, 214 F. 775 (CCA 2).

3. This presumption of negligence runs in favor of the "dumb tow" as well as the stationary object; and the tug bears the burden of going forward with proof that no act or omission on her part caused the collision in order to exculpate herself from fault. *The Steamer Webb*, 81 U. S. 406, 414; *Simkins* v. *Morrison & Sons*, 107 F. 2d 121, 1940 AMC 24, 26 (CCA 5); *The Clarence P. Howland*, supra; *Kiernan* v. *Lake Champlain Transportation Co.*, 273 F. 499, 501 (CCA 2). *The W. G. Mason*, 142 F. 913, 915 (CCA 2).

4. The Towboat CAIRO was negligent in attempting to negotiate a passing under the center navigation span of the Greenville Highway Bridge, with a tow of four loaded barges, against a seven mile current, from a position dead [fol. 33] in the water, one thousand feet below the span. One thousand feet was not sufficient distance to permit the heavy flotilla to reach full speed, known to be necessary to negotiate the span against the swift current and "boils" prevailing in the river at that point.

5. The Towboat CAIRO was negligent in failing to break up her tow of four loaded barges into groups of two, "double tripping" them through the Greenville Highway Bridge when difficulty was anticipated, or should have been anticipated, in negotiating the span against the swift current and "boils" prevailing in the river at that point. *Kiernan* v. *Lake Champlain Transportation Co.*, supra.

6. The charter between the New Orleans Coal and Bisso Towboat Company and the National Oil Transport Corporation dated September 15, 1941 was a demise of the vessel to the charterer and the National Oil Transport Corporation became the owner thereof pro hac vice. Consequently, the contract of towage entered into between the National Oil Transport Corporation and respondent is binding on libelant, the owner of the vessel, in respect to any claims against respondent for damage to the vessel. *Monk* v.

Cornell Steamboat Co., 198 F. 472 (CCA 2); *The Daniel Burns*, 52 F. 159.

7. The provision of the towage contract which reads that "the movement contemplated will be done at the sole risk of the 'craft to be towed' " . . . does not exonerate the tug from liability for its negligence. *The Syracuse*, 79 U. S. 167, 171; *The Wash Gray*, 277 U. S. 66, 73, 1928 AMC 923.

[fol. 34] 8. The provision of towage contract which provides that "the masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed' shall, in the performance of said services become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the services in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof . . . "when read with the other provisions in the contract relative to release from liability unequivocally evidences a clear intention on the part of the parties to the contract to relieve the tug from liability even for its own negligence. Such a provision is not against public policy. In fact the highest public policy is found in the enforcement of the contract which was actually made. It would be unconscionable to allow libelant upon the occur-ence of a mishap to repudiate the agreement upon which the towage service was obtained. *Sun Oil Company* v. *Dalzell Towing Co.*, 287 U.S. 291, 1932 AMC 149. To hold that the towage contract did not relieve the tug from liability for its own negligence would be to stultify and set at naught the obvious intention of the parties.

Decree accordingly.

New Orleans, Louisiana,

September 1st, 1953.

s/J. Skelly Wright, United States District Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed September 1, 1953

WRIGHT, District Judge:

This case graphicaly protrays the quand-ry in which the Marine Industry, as it relates to towing contracts, finds itself because of two decisions of the Supreme Court. In the first of these decisions, The WASH GRAY[1], the court held, in interpreting a towage contract, that the provision "all risk to be borne by the tow" did not release the tug from liability for damage caused by its negligence, whereas in *Sun Oil Company* v. *Dalzell Towing Company*,[2] the court held valid and enforcible the so-called pilotage clause of a towing contract providing that the tug and her owner will not be liable for any damage resulting from orders given by the tug captain to the assisting tugs while the tug cap-[fol. 36] tain is aboard the assisted vessel.

Respondent here, in an effort to protect itself under this state of the law, used in its towage contract the general release from liability provision[3] as found in The WASH GREY and a clause[4] similar to the pilotage clause in *Sun Oil* v. *Dalzell*. It urges either or both of these provisions,

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[1] 277 U. S. 66, 1928 AMC 923.

[2] 287 U. S. 291, 1932 AMC 149.

[3] The provision reads as follows:

"(4) The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo."

[4] The clause reads as follows:

"The masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed' shall, in the performance of said service, become and be the servants of the 'craft to be towed' regardless of whether the 'craft to be towed' assists in the service in any way and irrespective of whether they be aboard the 'craft to be towed' or in command thereof;"

as well as other release language in the contract,[5] as a defense to the action by the libelant charging damage to its barge as a result of the negligence of the respondent's tug.

The litigious history of the release from liability clause in towing contracts properly begins in 1872 with The Steamer Syracuse[6] in which the Supreme Court announced the principle that where a towage contract recites that the towage is to be performed "at the risk of the master and [fol. 37] owner" of the tow, the tug is not exempt from liability for its own negligence. Following The Syracuse there arose a conflict between the Court of Appeals for the Second Circuit[7] and the Court of Appeals for the Ninth Circuit[8] in respect to the enforcibility of the release from liability clause where negligence on the part of the tug is shown, the Second Circuit, finding that the Supreme Court in The Syracuse had not squarely decided the point, held that where a towage contract provided that the towage would be at the risk of the towed vessel, such contract exempted the tug from liability even for its own negligence. The Ninth Circuit, on the other hand, assuming The Syracuse to be a square holding on the effect of a release from liability clause, held that the clause did not relieve the tug from liability for its own negligence. This conflict apparently was resolved in favor of the Ninth Circuit by the Supreme Court in The Wash Gray wherein it

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[5] The other release language reads as follows:

> ". . . and neither the boats and/or any other equipment used in said service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring."

[6] 12 Wall. 167.

[7] The Oceanica, 170 F. 893 (CCA 2).
Ten Eyck v. Director General of Railroads, 267 F. 974 (CCA 2).

[8] Alaska Commercial Co. v. Williams, 128 F. 362 (CCA 9)
Mylroie v. British Columbia Mills Tug & Barge Co., 268 F. 449 (CCA 9). Sacramento Navigation Co. v. Salz, 3 F. 2d 759 (CCA 9).

was held that a contract which provided that all risk would be borne by the towed vessel did not relieve the tug from liability for its own negligence.

[fol. 38] Four years later, however, in *Sun Oil* v. *Dalzell Towing Company*, the Supreme Court held valid and enforcible, against a charge of negligence, the so-called pilotage clause of a towage contract in which it was provided that the employees of the tug became the employees of the tow when aboard the tow directing the navigation of the tug. In so deciding the Supreme Court said [9] that the va-

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[9] In *Sun Oil Co.* v. *Dalzell Towing Company*, at page 294, the court said:

> "The validity of its applicable provision cannot reasonably be doubted. So far as concerns the service to be rendered under the agreement, respondent was not a common carrier or bailee or bound to serve or liable as such. Towage does not involve bailment, and the services covered by the contract were less than towage. Stevens v. The White City, 285 U. S. 195, 200. There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence. Railroad Co. v. Lockwood, 17 Wall. 357. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 440. Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made.' Santa Fe, P. & P. Ry. Co. v. Grant Bros. Co., 228 U. S. 177, 188."

lidity of the clause could not be reasonably doubted, that no rule of public policy makes invalid a release clause even as to negligence, and that the highest public policy is found in the enforcement of the contract as it was written.

Since these two decisions, the position of the Supreme Court with respect to release clause has been a matter of [fol. 39] much speculation by the lower courts and by law writers. Unfortunately, in The Wash Gray the court did not disclose its reasons, other than citing The Syracuse, for holding the release clause unenforcible as against the tug's own negligence, and in *Sun Oil* v. *Dalzell*, while the principles underlying the Court's conclusion were clearly stated, the clause in question was materially different from the general release from liability clause.

These cases can be reconciled only by assuming that the Supreme Court in The Wash Gray refused to enforce the release clause against a charge of negligence on the part of the tug, not because it was against public policy so to do, but because it felt that the language of the release clause there in suit was not sufficiently unequivocal to release the tug from liability for its own negligence, it appearing that in neither The Syracuse nor The Wash Grey did the clause in question specifically say that the tug was released from liability for its own negligence. This conclusion is supported by the fact that the Supreme Court has held that a tug is not a common carrier and owes its tow only the duty of ordinary care[10] and, consequently, the doctrine that common carriers and others under like duty cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence is not applicable to the contract of towage.[11] Therefore, since [fol. 40] the contract of towage is not so affected with a public interest as to make a release from liability clause against public policy and since the highest public policy is found in the enforcement of a contract as it is written, there would seem to be no reason why such clause should not be valid and enforcible even as to the negligence of

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[10] Stevens v. The White City, 285 U. S. 195, 1932 AMC 468.

[11] Sun Oil Co. v. Dalzell Towing Co., supra.

the tug, provided the agreement of the parties on this point is clear and unequivocal.

Applying the above principles to the case at bar, it is clear that the general release clause in the contract in suit is unenforcible under The Wash Gray, the tug's exemption from liability for negligence not being sufficiently spelled out. The so-called pilotage clause, however, presents a greater problem. The pilotage clause here differs from the pilotage clause in *Sun Oil* v. *Dalzell* in that it is provided that the employees of the tug are employees of the tow is irrespective of whether they are aboard the assisted vessel. The difference in the clause indicates the difference in the type of service performed. In *Sun Oil* v. *Dalzell*, the tower, was required under his contract to move a sea-going vessel of considerable size through a crowded harbor to a dock. That service is customarily performed by the tug captain boarding the assisted vessel and directing her navigation as well as the navigation of the tug or tugs. Here the service required under the contract was simply towing a dumb barge from one port to another. While the difference in the service to be performed under the Sun Oil contract and the contract here is obvious, the facts of the two cases are not so different that a different result should be [fol. 41] reached as to the validity and enforcibility of the clause in question. The general principles announced by the Supreme Court in *Sun Oil* v. *Dalzell* are certainly broad enough to cover the pilotage clause here and since the language of that clause together with the other release language in the contract clearly evidences the obvious and unmistakable intent of the parties that respondent be relieved from liability for its own negligence, the claim of libelant herein must fail.

Decree pursuant to the findings of fact and conclusions of law this day found.

New Orleans, Louisiana,
September 1st, 1953.

s/J. Skelly Wright, United States District Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

DECREE—Filed September 14, 1953

This cause having duly come on to be heard on the pleadings and briefs, and having been argued and submitted by the advocates of the respective parties, and the Court, after due deliberation, having rendered its opinion in writing and directing a decree dismissing the libel herein with costs,

It is ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with costs.

New Orleans, Louisiana, September 14th, 1953.

(S.) Skelly Wright, United States District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 21, 1953

Sirs, please take notice that William A. Bisso, Jr., Receiver, New Orleans Coal and Bisso Towboat Company, libelant herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final decree of this court, which decree was entered herein on September 16th, 1953.

Very truly yours,

(S.) Deutsch, Kerrigan & Stiles, 1700 Hibernia Bank Bldg., New Orleans, Louisiana.

[fol. 43] Phelps, Dunbar, Marks & Claverie United Fruit Building, New Orleans, Louisiana, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—September 22, 1953

The within appeal is hereby allowed.

(S.) J. Skelly Wright, United States District Judge.

In United States District Court

Assignment of Errors—Filed September 23, 1953

The Court erred in finding that the provision, of the towage contract between National Oil Transport Corporation and respondent, that, "the masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed' shall, in the performance of said services become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the services in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof . . .", released respondent from liability to libelant for the negligence of the master of the Towboat CAIRO.

(S.) Deutsch, Kerrigan & Stiles, Phelps, Dunbar, Marks & Claverie, Proctors for Libelant.

New Orleans, Louisiana. September 23rd, 1953.

[fols. 44-45] Designation of Record on Appeal (omitted in Printing)

[fol. 45a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 14,802

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.

versus

INLAND WATERWAYS CORP.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Dated February 23rd, 1954, omitted in printing.

[fol. 48] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14802

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO., Appellant

versus

INLAND WATERWAYS CORP., Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION—Filed March 26, 1954

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges

HUTCHESON, Chief Judge: This is an appeal from a final decree dismissing appellant's libel in personam against Inland Waterways Corporation, owner of the Towboat Cairo, to recover for loss of appellant's Steel Tank Barge Bisso #9 while in tow of the Cairo, by the latter's negligence.

[fol. 49] On December 1, 1943, National Oil Transport Corporation, charterer of appellant's barge, entered into a contract with appellee for towage of a number of Na-

tional's barges, including the Bisso #9, on the Mississippi River. This contract provided:

> "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the boats and/or any other equipment used in said service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed' however occurring.
>
> "The masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed,' shall in the performance of said service, become and be the servants of the 'craft to be towed,' regardless of whether the 'craft to be towed assists in the service in any way and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

In May, 1944, appellee's Towboat Cairo took in tow eight unmanned barges belonging to various persons, and proceeded up the Mississippi River from New Orleans. The Bisso #9 was one of these barges. None of the barges had any motive power or steering mechanism.

Because of high water and dangerous conditions prevailing in the Mississippi River above Vicksburg, the Cairo's tow was split up near that point, and moved alternately in groups of four barges, of "doubles tripped."

While attempting to negotiate the center span of the Greenville Highway Bridge, the Cairo negligently brought [fol. 50] her tow of four barges into collision with a bridge pier; and appellant's barge was lost in the collision as a direct result of the Cairo's negligence.

The District Court, making full findings of fact and conclusions of law, and filing an opinion,[1] held that the collision was attributable to the negligence of the Cairo; that the "release towage agreement" in question did not relieve the Cairo from liability for negligence; but that the "pilotage clause" was broad enough to make the Cairo's crew appellant's servants and to free appellee from responsibility for their negligence. The libel was accordingly dismissed.

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[1] Bisso v. Inland Waterways Corp., 114 Fed. Supp. 713.

Appellant, raising no question of fact, but resting its case on the facts found by the district judge and his conclusion that the first clause, "sole risk and release clause," of the towage contract was, under The Syracuse, 79 U. S. 167, and The Wash Gray, 277 U. S. 66, cases invalid, is here insisting that the court erred in holding the second clause, the so-called "pilotage clause," in the contract, providing that the personnel of the tug are to be deemed "the servants of the tow," releases the tug from liability for loss of the tow by negligence of the master of the tug.

Appellee, opposing this view, urges upon us that, far from its being clear, as appellant argues, that a pilotage clause finds justification only where the tow is manned and under its own power, the situation of a tug with a dumb tow makes it more necessary for it to relieve itself of what may approach an insurer's liability.

[fol. 51] In addition, as to the "sole risk" or "release" clause, which the court below held invalid, appellee insists that this clause also was valid and effective. Arguing that the cases cited by the district judge in support of his view that the clause was invalid, are not authority for the holding, appellee, citing The Oceania, 170 Fed. 893 and *Ten Eyck v. Director General of Railroads*, 267 Fed. 974, insists that all that the Syracuse and Wash Gray cases held and all that they stand for is that the exculpatory provision denied effect in each of them was not intended by the parties to encompass negligence or at least they did not make this sufficiently clear. It argues in short that these two cases are but applications of the general rule that, while releases from liability for negligence are, except as to common carriers, bailees, etc., generally valid, they are construed strictly against the party favored, and, unless clearly and unequivocally showing that they include negligence, they will not be construed to include it.[2] So arguing, it insists that the questioned clause in The Syracuse failed to evince an unequivocal intention to include the negligence of the tower in the risk assumed by the tow, and that the same is true of the release clause involved in The Wash Gray.

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[2] Noonan v. Bradley, 9 Wall. 394; Halliburton Oil Well Cementing Co. v. Paulk, 180 F(2) 79; Fairfax Gas & Supply Co. v. Hadary, 151 F(2) 939.

In strong support of these views, the brief *amici curiae*, basing its arguments on the settled law that a tug is not a common carrier when it engages in towage, The Margaret, 94 U. S. 494, and that the relationship of bailor-bailee does not exist between tug and its tow,[3] insists that if the tug is not a common carrier or bailee as to its tow, there is no [fol. 52] reason in logic or in law why it should not be permitted full freedom of contract in limiting or restricting its liability.

Urging, therefore, that there should be, and is, no difficulty in the way of parties agreeing as they please in cases such as this, and that if the parties to a contract unequivocally shift the liability for loss or damage to the tow from the owner of the tug to the owner of the tow, there can be no reason for holding that the shift is invalid, they insist that it would be difficult, if not impossible, to find apter language for doing so than that employed here. So insisting, they urge upon us that while the district judge was right in exonerating the tug under the "pilotage" clause, he erred in holding that the release towage agreement did not release the tug from negligence.

We find ourselves in general agreement with the approach of appellee and *amici curiae* to the questions presented and the positions taken by them below and here, that not merely one, as found by the district judge, but both of the clauses relied on are valid and effective to release the appellee from liability, and that the decree should, therefore, be affirmed.

Affirmed.

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[3] Stevens v. The White City, 285 U. S. 195; New Orleans Coal & Bisso Towboat Co. v. United States, 86 F(2) 53.

[fol. 53] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,802

WILLIAM A. BISSO, JR., Receiver, NEW ORLEANS COAL AND BISSO TOWBOAT CO.,

versus

INLAND WATERWAYS, CORP.

JUDGMENT—March 26th, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, William A. Bisso, Jr., Receiver, New Orleans Coal and Bisso Towboat Co., be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 50

WILLIAM A. BISSO, JR., Receiver, New Orleans Coal and Bisso Towboat Co., Petitioner,

vs.

INLAND WATERWAYS CORPORATION

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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PAUL P. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted]50

THE BISSO NO. 9

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.
Petitioner-Appellant Below

versus

INLAND WATERWAYS CORPORATION
Respondent-Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EBERHARD P. DEUTSCH
Proctor for Petitioner

DEUTSCH, KERRIGAN & STILES

RENÉ H. HIMEL, JR.

FRANCIS EMMETT

Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

THE BISSO NO. 9

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.
Petitioner-Appellant Below

versus

INLAND WATERWAYS CORPORATION
Respondent-Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit herein; and in support of its petition respectfully shows:

I

QUESTION PRESENTED

The important controversial question of law presented for determination in this case is:

> May a tug contract against liability for her own negligent towage; and, if so, may the standard "release towage" and "modified pilotage" clauses, in current use in towage contracts generally, properly be construed as stipulations against the tug's own negligence?

The primary question of the right of tugs to contract against their own negligence at all, is hopelessly confused. The Fifth Circuit, in the decision under review, has held squarely that they may. The Ninth Circuit has held squarely that they may not. Decisions within the Second Circuit are in conflict.

This court has rendered three decisions on the subject. Failure of these decisions definitively to resolve the question at issue is demonstrated by inter- and intra-circuit conflicts in opinions all purporting to follow and apply decisions of this court.*

The related question of adequacy of the "release towage" and "modified pilotage" clauses—standard in towage contracts throughout the nation—as stipulations against the tug's own negligence, is at least equally unsettled.

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* "This case graphically portrays the quandary in which the marine industry, as it relates to towing contracts, finds itself because of two decisions of the Supreme Court." Opinion of the district court in this case, R 35, 114 FS 713, 714.

The decision below as to sufficiency of the "release towage" clause is directly contrary to two decisions by this court. The decision below as to the effect of the "modified pilotage" clause is, as an effort to extend and apply a third decision by this court, in further conflict with decisions by the Fourth and Sixth Circuits.

Authoritative and definitive resolution of the entire question is of the greatest moment to the entire towage industry, both deep sea and inland, as well as to all businesses affected thereby.

II

JURISDICTION and OPINIONS BELOW

Jurisdiction of this court lies under 28 USC 1254.

The opinion of the district court was rendered on September 1, 1953, and is reported at 114 FS 713, 1953 AMC 1664. The opinion of the court of appeals was rendered on March 26, 1954, and has not yet been reported.

III

STATEMENT OF THE MATTER INVOLVED

Petitioner, owner of the Barge BISSO NO. 9, brought this action to recover for loss of the barge while in tow by respondent, an agency of the United States Government.

The towage contract contained the standard "release towage" and "modified pilotage" clauses, providing respectively:

> "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the (tow) boats and/or any other equipment used in said (towage) service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.
>
> "The master and crews and employees of all (tow) boats and/or other equipment assisting the 'craft to be towed', shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

While the unmanned and unpowered BISSO NO. 9 was in tow of respondent's Towboat CAIRO, the barge was brought into collision with a bridge pier and was lost through the towboat's negligence.

The district court held that this negligence was the cause of the loss; that the "release towage" clause did not relieve respondent from liability for its negligence; but that the "modified pilotage" clause had that effect. The action was accordingly dismissed.

Affirming, the court of appeals held that "not merely one, as found by the district judge, but both of the

clauses relied on are valid and effective to release the appellee from liability".

IV

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The present uncertainty as to the validity and effect of contractual stipulations by towers against liability for negligence, stems from three decisions by this court.

In 1870, in *The Syracuse*, this court held that a towing steamer is liable for loss sustained by her tow "through the negligence of those in charge of" the steamboat, even though, "by special agreement", the tow "was being towed at her own risk", because "although the policy of the law has not imposed on the towing boat the obligation resting on the common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill".[1]

From 1870 to 1909, this holding was followed in a number of decisions, none ever suggesting that it meant anything other than that a provision in a towage contract that the operation was to be at the risk of the tow, did not, or could not validly, exonerate the tug from liability for her own negligence.[2]

---

[1] 12 Wall. (79 US) 167, 171 (1870).

[2] Thus, in *Alaska Commercial Co. vs Williams*, 138 Fed. 362, 366 (CA 9-1904), the Ninth Circuit, citing *The Syracuse*, held, as later stated by the same court in *Mylroie vs British Columbia Mills Tug & Barge Co.*, 268 Fed. 449, 451 (CA 9-1920), aff'd, 259 US 1, that a tug is "not allowed by law to avoid by contract the consequences of its own negligence". See also, *e. g., Deems vs Albany & Canal Line*, FS No. 3736 (SD NY-1878); *Ulrich vs The Sunbeam*, FC No. 14329 (DC NJ-1878); *The M. J. Cummings*, 18 Fed. 178 (ND NY-1883); *In re Moran*, 120 Fed. 556 (ED NY-1903).

But in 1909, in *The Oceanica*,[3] the Second Circuit concluded that *The Syracuse* need no longer be followed. The court held that, a tug not being a common carrier in relation to her tow, and accordingly "being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence".

Judge Coxe dissented, and on rehearing, Judge Ward wrote: "We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court." But certiorari was denied.[4]

In 1920, the Ninth Circuit decided *Mylroie vs British Columbia Mills Tug & Barge Co.*, which involved a towage contract providing that "the tug company is not to be held liable for any damage which might happen to the said barge Bangor or its cargo while in tow or at anchor". The court expressly refused to follow the holding of the Second Circuit in *The Oceanica;* and stated that it felt itself bound by this court's opinion in *The Syracuse* to hold not only that this clause did not operate to relieve the tug of liability for damage caused by her own negligence, but that a tug may not validly contract against such liability.[5]

---

[3] 170 Fed. 893 (CA 2-1909).

[4] 215 US 599. The Second Circuit subsequently twice reiterated the holding of *The Oceanica*. See *Monk vs Cornell Steamboat Co.*, 198 Fed. 472 (CA 2-1912); *Ten Eyck vs Director General of Railroads*, 267 Fed. 974 (CA 2-1920).

[5] 268 Fed. 449 (CA 9-1920), aff'd, 259 US 1. Certiorari was granted in this case, and the decision affirmed, but this court found "it unnecessary . . . to consider the contention on behalf of the barge that the exemption clause is void". 259 US at p. 12. See also *The Sea Lion*, 12 F2d 124 (ND Calif.-1926).

In 1928, in *The Wash Gray*, this court apparently resolved the conflict, citing *The Syracuse* as still representing the "state of the law", and holding that a clause in a towage contract to the effect that the towing vessel was not to be "responsible in any way for loss or damage to" her tow, "did not release" the towing vessel from loss thereof, or damage thereto, if caused by "the negligence of the master or crew of the towing vessel".[6]

Whether *The Wash Gray* decided that the "release towage" clause is invalid, or, as argued by respondent and held by the district court below, only that it is insufficient as a stipulation against liability for negligence, the instant holding of the court of appeals, giving effect to the "release towage" clause as against the tower's own negligence, is in specific conflict with the cited decision of this court.

Confusion was compounded rather than composed by this court's third pertinent opinion, rendered in *Sun Oil Company vs Dalzell Towing Company*,[7] four years after decision of *The Wash Gray*.

In the *Sun Oil* case a tanker was stranded and damaged while being docked under her own power and using her own steering mechanism, with her own master and crew at their stations, being assisted in the maneuver by tugs, the captain of one of which was on the bridge of the tanker acting as her pilot. The casualty resulted

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[6] 277 US 66, 73 (1928). The opinion of the Second Circuit in *The Oceanica* was cited to this court (277 US at p. 70) but was not mentioned by it in its opinion. See Robinson, *Handbook of Admiralty Law* (1939); *Note*, 28 Cornell Law Quarterly 194, 195 (1943).

[7] 287 US 291 (1932).

from the negligence of the tug captain aboard the tanker, not from the negligence of either tug.

The docking maneuver was being performed under an agreement which contained the following pilotage clause:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

This court enforced the clause in the situation presented, as "an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for, and is to be deemed the employee of, the latter and not the former".[8]

The Second Circuit had stated, in its opinion in the same case, that "a distinction may well be taken between a towage contract as such and a pilotage contract", and had stressed the difference between a situation in which "the 'assisted vessel' is under her own power and the

[8] *Id.*, at pp. 294-95.

towing company merely supplies a tug master as a pilot", and that in which "a tug owner is engaged in towing a dead vessel".[9]

This court also called particular attention to the fact that "the services covered by the contract were less than towage"; that the towing company did not undertake "to do more than to furnish tugs to assist" the vessel "while using her own propelling power . . . and steering apparatus"; and that at no time did the towing company have "control of the tanker", but, on the contrary, "her master, officers and crew were at their stations".[10]

The presence of the master at his station in pilotage cases is not merely figurative or symbolic. The fact that there is a pilot on the bridge does not alter the master's ultimate command of his vessel. As pointed out by the Second Circuit, "the master need not have allowed the pilot to conduct the navigation unless he was satisfied to trust it to him, and if dissatisfied he could have removed him".[11]

The validity of the pilotage clause would thus seem based primarily on the presence of the master of an assisted vessel at his station in command of his ship, proceeding under her own power, with authority to direct and even to remove the pilot.[12]

In the instant case, the district court quoted from the opinion of this court in the *Sun Oil* case, the statement

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[9] 55 F2d 63, 65 (CA 2-1932).
[10] 287 US at pp. 294-5.
[11] *The West Eldara*, 101 F2d 45, 47, mod., 104 F2d 670 (CA 2-1939), cert. den., 308 US 607.
[12] *Cf. Petterson Lighterage & Towing Corp. vs Tug J. R. Russell*, 87 FS 467 (SD NY-1949).

that "there is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence."[13]

But this language must be read in the setting of the facts of that case, involving a vessel commanded by her own master, navigated under her own power by her own officers and crew, and simply being assisted by tugs; and, as discussed hereunder, should not be applied to a helpless barge under the complete domination and absolute control of her tug.

The only reference made by this court, in the *Sun Oil* case, to its *Syracuse* and *Wash Gray* opinions, was the somewhat equivocal statement that "the decree under consideration is not in conflict with the decisions of this court cited by petitioner. . . . Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns."[14]

The Eastern District of New York has, as did the district court and presumably the court of appeals below, construed the *Sun Oil* decision as validating all contracts relieving tugs from liability for their own negligence.[15] The Ninth Circuit has rejected this interpretation,[16] as

[13] R 38, 114 FS 713, 715, quoting from 287 US at p. 294.
[14] 287 US at p. 295.
[15] *The John J. Feeney*, 3 FS 270 (ED NY-1933); *The Primrose*, 3 FS 267 (ED NY-1933).
[16] *Hall-Scott Motor Car Co. vs Universal Ins. Co.*, 122 F2d 531, 535-36 (CA 9-1941), cert. den., 314 US 691.

has the Southern District of New York, holding that the *Sun Oil* opinion was not intended to upset the long-standing proscription of towers'-release clauses, but only to establish a special rule for the "special case . . . when the tow is under power and in control of the tower's [tow's?] servants."[17]

The Sixth Circuit, citing the *Sun Oil* case decided only a few months earlier, has held that, even in the case of a harbor maneuver under a steamer's own power and steerage, with her master in command, an assisting towing company whose tug captain was guilty of negligence was not relieved of liability by the pilotage clause, when he had acted on "his own initiative, without subordination to" the master of the steamer.[18]

Somewhat similarly, it had been held by the Fourth Circuit that a pilotage clause in such a contract was ineffective to relieve a tower of liability for negligence of its tug captain, when it was shown "that the tugs were engaged to assist her to get out", and that the vessel's "own propelling power had not been used at the time the accident occurred".[19]

The decision below conflicts with these holdings at least in its extension of the *Sun Oil* doctrine as justifying application of the "modified pilotage" clause to towage of a dead, dumb barge completely at the mercy of her tug; and, it is submitted, tears more fundamentally

[17] *Petterson Lighterage & Towing Corp. vs Tug J. R. Russell*, 87 FS 467, 470 (SD NY-1949).
[18] *Great Lakes Towing Co. vs Bethlehem Transp. Co.*, 65 F2d 543, 544 (CA 6-1933).
[19] *Calzavaro vs Planet Steamship Corp.*, 31 F2d 885, 889 (CA 4-1929).

at the fabric of principle woven by this court itself in its *Syracuse*, *Wash Gray* and *Sun Oil* opinions.

Those opinions, read together, seem, and as noted above, have been construed by the Ninth Circuit and the Southern District of New York, to hold that an assisting tug may stipulate against liability for the negligence of her master while aboard, and subject to the authority of the master of, the assisted vessel which is proceeding under her own power; but that a tug may not, by contract, limit her liability for negligent damage to an unmanned, unpowered tow, entirely under the control of the tug.

Read in the light most favorable to respondent, the cited decisions hold the "release towage" clause insufficient to relieve a tug from her own negligence; and stop studiedly short of upholding applicability of the "pilotage" clause to dumb towage.[20]

There are clear fundamental relational differences between mere assistance by tugs in docking a self-propelled vessel operating under her own power and command; and towage of large fleets of unmanned cargo barges belonging to different owners.[21]

In its opinion in this case, the court of appeals cited *Stevens vs The White City*, in which this court held that, for certain purposes unrelated to attempted contractual ex-

[20] "If it be intimated that *Sun Oil Company vs Dalzell Towing Company, Inc.*, may have modified the other two cases (*The Syracuse* and *The Wash Gray*), it is submitted, however, that the last case stands alone on its peculiar facts." *Note*, 28 Cornell Law Quarterly 194, 195 (1943).

[21] Cargo barge fleets have consisted of as many as "forty and fifty barges at a time". Rosskam, *Towboat River* (1948) 18, 59. See also Durant, *Pictorial History of American Ships* (1953) 282. The fleet involved in the tow in the case at bar consisted of eight unmanned cargo barges belonging to different owners. R 29.

oneration from liability, a tug was not to be considered the bailee of a single, normally self-propelled vessel in tow manned by her owner's representative during at least part of the towage service.[22]

Recent cuttings at the base of *Stevens vs The White City*, insofar as applicable to towage of unmanned vessels,[23] were seized on by respondent in support of its argument below, as paraphrased by the court of appeals, that "the situation of a tug with a dumb tow makes it more necessary for it to relieve itself of what may approach an insurer's liability".

Modern towage creates a bailment relation affected in large measure with the public interest.[24] *Stevens vs The White City* by no means decrees that the reasons prohibiting a bailee from contracting against liability for his own negligence may not be applied today with equal force to towage of a fleet of unmanned barges.[25]

[22] 285 US 195 (1932). Judge Clark of the Second Circuit has suggested that "the pains the (this) Court takes (in the *Stevens* opinion) to emphasize the lack of surrender of control in the ordinary towage contract" implies non-applicability of the rule of that decision in cases of towage involving cession to the tug of complete control of an unmanned tow. *Turecamo Towing Corporation vs United States*, 125 F2d 1001, 1002 (CA 2-1942). See also Robinson, *Handbook of Admiralty Law* (1939) 666.

[23] As in *Sternberg Dredging Co. vs Moran Towing & Transportation Co.*, 196 F2d 1002, especially on rehearing, 200 F2d 603 (CA 2-1953).

[24] Since the *Stevens* decision, Congress has come to the conclusion, in the Transportation Act of 1940, that the reasons justifying governmental regulation of common carriers generally, are equally relevant to towage. 49 USC 901 et seq. See *Cornell Steamboat Co. vs United States*, 321 US 634 (1944).

[25] "The design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it." Coxe, Cct. J., dissenting in *The Oceanica*, 170 Fed. 893, 896 (CA 2-1909), cert. den., 215 US 559. See *Note*, 26 Cornell Law Quarterly 303 (1941). The motion of *amici curiae* in the court of appeals (reprinted in the *Appendix* hereto) itself demonstrates that the practice among towers of inserting "release towage" and "modified pilotage" clauses in their towage contracts, is extremely widespread if not universal.

V

CONCLUSION

In the present posture of the law, the same standard provision of the same towage contract covering widespread operations may be enforced or repudiated depending on the court in which the action involving it is brought.

The Ninth Circuit and the Southern District of New York reject all efforts by towers contractually to avoid liability for their own negligence. The Fifth Circuit and the Eastern District of New York, on the other hand, recognize the validity of such contractual stipulations. Despite two decisions of this court directly to the contrary, the Fifth Circuit has endorsed the effectiveness of the "release towage" clause to accomplish this purpose.

The Fourth and Sixth Circuits have refused to enforce the "pilotage" clause in situations more closely resembling towage than pilotage. The Fifth Circuit, on the contrary, has held the "pilotage" clause applicable to towage.

All three major facets of the over-all problem at issue—whether a tug may stipulate at all against liability for damage by her own negligence to her unmanned tow; whether the standard "release towage" clause is adequate to this end; and whether the "modified pilotage" clause is either valid or applicable in a towage situation—are present and may be decided squarely in this case.

It is respectfully submitted that these considerations warrant allowance of the writ which petitioner seeks.

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April, 1954.

VI

APPENDIX

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

(in the Court of Appeals)

Now come Selim B. Lemle, Charles Kohlmeyer, Jr., and George B. Matthews and show that they are counsel for American Barge Lines, Inc., Coyle Lines Incorporated, Crescent Towing & Salvage Co., Inc., Dixie Carriers, Inc., John I. Hay Company, Mississippi Valley Barge Line Company, Mobile Towing & Wrecking Co., and Union Barge Line Corporation; that Crescent Towing & Salvage Co., Inc. and Mobile Towing & Wrecking Co., Inc. are the owners and operators of large fleets of harbor tugs in New Orleans and Mobile respectively; and that all of the other parties are owners and operators of fleets of river towboats and barges plying the Mississippi River and its tributaries and the Intracoastal Canal.

Movers show that the parties all perform towing services for each other and the public at large under towage contracts containing provisions for the release from liability of towing craft for its negligence substantially similar to the release clause, the validity of which has been attacked in the instant case; that the interpretation placed on the release clause will have a material effect upon the methods of doing business of all the parties whom movers represent; and accordingly movers pray for leave to file the attached brief as Amici Curiae in support of the position of Appellee.

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OCTOBER TERM, 1954

No. 50

THE BISSO No. 9

**WILLIAM A. BISSO, JR., RECEIVER,
NEW ORLEANS COAL AND BISSO TOWBOAT CO.**
Petitioner

versus

INLAND WATERWAYS CORPORATION
Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 50

THE BISSO No. 9

WILLIAM A. BISSO, JR., RECEIVER,
NEW ORLEANS COAL AND BISSO TOWBOAT CO.
Petitioner

versus

INLAND WATERWAYS CORPORATION
Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court (R 27) was rendered on September 1, 1953, and is reported at 114 FS 713, 1953 AMC 1664. The opinion of the court of appeals (R 35)

was rendered on March 26, 1954 and is reported at 211 F2d 401, 1954 AMC 648.

JURISDICTION

Jurisdiction of this court was invoked by petition for writ of certiorari filed on April 26, 1954, under 28 USC 1254. Certiorari was granted on October 14, 1954, US .

QUESTION PRESENTED

The question presented for review is, generally, whether a tug may contract against liability for her negligent towage of unmanned vessels; and, particularly, whether the "release towage" and "modified pilotage" clauses in current use in towage contracts may have such effect.

STATEMENT OF THE CASE

Petitioner, owner of the Barge *Bisso No. 9*, brought this action to recover for loss of the barge while in tow by respondent, an agency of the United States Government.[1]

The towage contract contained customary "release towage" and "modified pilotage" clauses, providing respectively:

> "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the (tow) boats and/or any other equipment used in said (towage) service

[1] R 1-2, 4.

> nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.
>
> "The master and crews and employees of all (tow) boats and/or other equipment assisting the 'craft to be towed', shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof." [2]

While the unmanned and unpowered *Bisso No. 9*, with seven other similar barges of other owners, was in tow of respondent's Towboat *Cairo*, the barge was brought into collision with a bridge pier and was lost through the towboat's negligence.[3]

The district court concluded that the "release towage" clause was insufficient by its terms to relieve respondent from liability for its negligence, but that the "modified pilotage" clause had that effect. The action was accordingly dismissed.

Affirming, the court of appeals held that "not merely one, as found by the district judge, but both of the clauses relied on are valid and effective to release the appellee from liability".

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[2] R 11-12.

[3] "The District Court . . . held that the collision was attributable to the negligence of the Cairo". R 36; 211 F2d at 402. This finding has not been contested on appeal.

SUMMARY OF ARGUMENT

Decisions of this court and of other admiralty courts have established and reiterated for nearly a century, the rule that a tower may not contract against liability for his own negligence in towing unmanned vessels.

This rule is amply supported by valid reasons of policy, and, having been left undisturbed by Congress in its intervening regulation of the towage industry, should not be altered judicially.

Alteration of the rule is not justified by this court's sanction of contractual exoneration of a mere assisting tug, from liability for the negligence of the tug captain while aboard the fully manned and powered assisted vessel, subject to the direct authority and control of that vessel's own master.

ARGUMENT

Background

Attempts by towers to stipulate against liability for their own negligence have been the subject of litigation in courts of the United States for almost a century.

In 1870, in *The Syracuse*, this court held that a towing steamer is liable for loss sustained by her tow "through the negligence of those in charge of" the steamboat, even though, "by special agreement", the tow "was being

towed at her own risk", because "although the policy of the law has not imposed on the towing boat the obligation resting on the common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill".[4]

From 1870 to 1909, this holding was followed in a number of decisions, none ever suggesting that it meant anything other than that a provision in a towage contract that the operation was to be at the risk of the tow, could not exonerate the tug from liability for her own negligence.[5]

But in 1909, in *The Oceanica*,[6] the Second Circuit concluded that *The Syracuse* need no longer be followed. The court held that, a tug not being a common carrier in relation to her tow, may validly contract against liability for damage to the tow, even when caused by the tug's own negligence.

Judge Coxe dissented, stating: "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, care-

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[4] 12 Wall. (79 US) 167, 171 (1870).

[5] Thus, in *Alaska Commercial Co. vs Williams*, 128 Fed. 362, 366 (CA 9-1904), the Ninth Circuit, citing *The Syracuse*, held, as later stated by the same court in *Mylroie vs British Columbia Mills Tug & Barge Co.*, 268 Fed. 449, 451 (CA 9-1920), aff'd, 259 US 1, that a tug is "not allowed by law to avoid by contract the consequences of its own negligence". See also, *e. g.*, *Deems vs Albany & Canal Line*, FC No. 3736 (CC NY-1878); *Ulrich vs The Sunbeam*, FC No. 14329 (DC NJ-1878); *The M. J. Cummings*, 18 Fed. 178 (ND NY-1883); *The Rescue*, 24 Fed. 190 (WD Pa.-1885); *The American Eagle*, 54 Fed. 1010 (ND Ohio-1893); *The Jonty Jenks*, 54 Fed. 1021 (ND NY-1893); *In re Moran*, 120 Fed. 556 (ED NY-1903); *The Somers N. Smith*, 120 Fed. 569 (DC Me.-1903).

[6] 170 Fed. 893 (CA 2-1909).

lessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it".

On rehearing, Judge Ward conceded: "We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court." But certiorari was denied.[7]

In 1920, the Ninth Circuit decided *Mylroie vs British Columbia Mills Tug & Barge Co.*, which involved a towage contract providing that "the tug company is not to be held liable for any damage which might happen to the said barge Bangor or its cargo while in tow or at anchor". The court expressly refused to follow the holding of the Second Circuit in *The Oceanica;* and stated that it felt itself bound by this court's opinion in *The Syracuse* to hold that a tug may not validly contract against liability for her own negligence.[8]

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[7] 215 US 599. The Second Circuit has subsequently thrice reiterated the holding of *The Oceanica*. See *Monk vs Cornell Steamboat Co.*, 198 Fed. 472 (CA 2-1912); *Ter Eyck vs Director General of Railroads*, 267 Fed. 974 (CA 2-1920); *North River Barge Line vs Chile SS Co.*, 213 F2d 882 (CA 2-1954).

[8] 268 Fed. 449 (CA 9-1920), aff'd, 259 US 1. Certiorari was granted in this case, and the decision was affirmed, but this court found "it unnecessary . . . to consider the contention on behalf of the barge that the exemption clause is void". 259 US at 12. See also *The Vim*, 40 F2d 638 (DC RI-1930); *The Sea Lion*, 12 F2d 124 (ND Calif.-1926); *The Skagway*, 1925 AMC 1133 (WD Wash.).

In 1928, in *The Wash Gray*, this court apparently resolved the inter-circuit conflict, citing *The Syracuse* as still representing the "state of the law", and holding that a clause in a towage contract to the effect that the towing vessel was not to be "responsible in any way for loss or damage to" her tow, "did not release" the towing vessel from loss thereof, or damage thereto, if caused by "the negligence of the master or crew of the towing vessel".[9]

This court's third decision of possible relevance is that in *Stevens vs The White City*.[10] In the course of holding that evidence of damage to a tow while in custody of its tug does not create a presumption of negligence, this court took occasion to say that "under a towage contract the tug is not a bailee of the vessel in tow".[11]

However, the opinion clearly reflects that the holding to which reference is made, and the *dictum* quoted, in the preceding paragraph, are applicable only to towage of a single vessel actually or customarily manned during the towage operation: "The tug . . . and those in charge of her . . . do not have control such as belongs to common carriers and other bailees. They have no authority over

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[9] 277 US 66, 73 (1928). The opinion of the Second Circuit in *The Oceanica* was cited to this court (277 US at 70) but was not mentioned by it in its opinion. "In *The Steamer Syracuse*, the Supreme Court squarely held such an attempt (by a tug to contract against liability for her own negligence) invalid, recognizing at the same time that the tug was neither a common carrier nor a bailee. Again, in *Compania de Navegacion Interior vs Firemen's Fund Insurance Company (The Wash Gray)*, the court incidentally, if not squarely, affirmed the doctrine of the former case." *Note*, 28 Cornell Law Quarterly 194, 195 (1943). See also: *Note*, 26 Cornell Law Quarterly 303 (1941); Robinson, *Handbook of Admiralty Law* (1939) 672.

[10] 285 US 195 (1932).

[11] *Id.* at 200.

the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment." [12]

The lower admiralty courts have consistently declined to extend that holding and *dictum* to cases of towage of unmanned, non-self-propelled barges as in the situation at bar.[13]

The last pertinent decision of this court was rendered in *Sun Oil Company vs Dalzell Towing Company.*[14]

In that case, a tanker was stranded and damaged while being docked under her own power and using her own steering mechanism, with her own master and crew at their stations, being assisted in the maneuver by tugs, the captain of one of which was on the bridge of the tanker acting as her pilot. The casualty resulted from

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[12] *Ibid.*

[13] In *Turecamo Towing Corporation vs United States*, 125 F2d 1001, 1002 (CA 2-1942), Judge Clark suggested that "the pains the (Supreme) Court takes (in the *Stevens* opinion) to emphasize the lack of surrender of control in the ordinary towage contract" implies non-applicability of the rule of that decision in cases of towage involving cession to the tug of complete control of an unmanned tow. See also *Sternberg Dredging Co. vs Moran Towing & Transportation Co.*, 196 F2d 1002, especially on rehearing, 200 F2d 603 (CA 2-1953).

[14] 287 US 291 (1932).

the negligence of the tug captain aboard the tanker, not from the negligence of either tug.

The docking maneuver was being performed under an agreement which contained the following pilotage clause:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

This court enforced the clause in the situation presented, as "an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for, and is to be deemed the employee of, the latter and not of the former".[15]

The Second Circuit had stated, in its opinion in the same case, that "a distinction may well be taken between a towage contract as such and a pilotage contract", and had stressed the difference between a situation in which "the 'assisted vessel' is under her own power and the

[15] *Id.* at 294-95.

towing company merely supplies a tug master as a pilot', and that in which "a tug owner is engaged in towing a dead vessel".[16]

This court also called particular attention to the fact that "the services covered by the contract were less than towage"; that the towing company did not undertake "to do more than to furnish tugs to assist" the vessel "while using her own propelling power . . . and steering apparatus"; and that at no time did the towing company have "control of the tanker", but, on the contrary, "her master, officers and crew were at their stations".[17]

Analysis

In *The Syracuse* and *The Wash Gray*, discussed in the foregoing subdivision of this brief, this court clearly held that the tower of an unmanned vessel may not stipulate against liability for his own negligence in performance of that operation.[18]

The decisions have been so interpreted and applied over the years by a majority of the lower admiralty courts which have considered them; and are justly founded in the legitimate concept that such towage creates a bail-

[16] 55 F2d 63, 65 (CA 2-1932).

[17] 287 US at 293-4.

[18] The exegesis of the district court below—rightly rejected by the court of appeals—to the effect that *The Syracuse* and *The Wash Gray* stand only for the proposition that the release-from-liability clauses involved were insufficiently specific to be construed as stipulations against liability for negligence [see also *The Pacific Maru*, 8 F2d 166 (SD Ga.-1925)], is not acceptable logically. As the Second Circuit has pointed out, the tug "being only liable for negligence (as was expressly recognized in the opinion in *The Syracuse*), if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence". *The Oceanica*, 170 Fed. 893, 894 (CA 2-1909), cert. den., 215 US 599.

ment relation affected in large measure with the public interest.[19]

It is submitted that so sound a rule, so well supported for so long a time, should not now be disturbed; especially in light of Congress' abstention from alteration of the rule in the course of its intervening regulatory activities in the field.[20]

The extent to which towage of the type here involved is affected with the public interest, is perhaps best indicated by those very Congressional regulatory activities, which have extended to such towage together with other classes of inland common and contract carriage by water.

It is worthy of particular note in this connection, that Congress has never seen fit to encourage the towage industry by extending to towers the privileges, for exoneration from liability, granted to cargo vessels, for encouragement of that branch of maritime commerce, by the Harter and Carriage of Goods by Sea Acts.[21]

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[19] See cases cited in footnotes 5 and 8 *supra;* and *The Walter G. Hougland,* 184 F2d 530 (CA 6-1950); *Great Lakes Towing Co. vs American SS Co.,* 165 F2d 368 (CA 2-1948), cert. den., 333 US 881; *Hall-Scott Motor Car Co. vs Universal Ins. Co.,* 122 F2d 531 (CA 9-1941); *Petterson Lighterage & Towing Corp. vs The J. Raymond Russell,* 87 FS 467 (SD NY-1949). *Cf.* cases cited in footnotes 6 and 7 *supra* and 31 *post;* and *The John J. Feeney,* 3 FS 270 (ED NY-1933); *The Primrose,* 3 FS 267 (ED NY-1933); *The Mercer,* 14 F2d 488 (ED NY-1926). In *North River Barge Line vs Chile SS Co.,* 213 F2d 882 (CA 2-1954), the Second Circuit took cognizance of the holding of *The Syracuse* and *The Wash Gray,* but erroneously concluded that that holding had been overruled in the *Sun Oil* case.

[20] *Cf. United States vs Atlantic Mutual Ins. Co.,* 343 US 236 (1952). Congress regulated towage in the Transportation Act of 1940, 49 USC 901 *et seq.* See *Cornell Steamboat Co. vs United States,* 321 US 634 (1944).

[21] 46 USC 190 *et seq.* and 1301 *et seq.*

The considerations precluding contractual exemption of a bailee for hire from liability for his negligence, apply equally to towage of unmanned barges, whether the primary consideration be the unequal bargaining positions of the parties to the contract,[22] or the bailee's exclusive control of the thing bailed as intimated in *Stevens vs The White City*.[23]

An additional important ground of policy for the same result, peculiarly applicable to the bailments involved in towage and transportation by water generally, is the public interest in maintaining high standards of skill and care in navigation[24]—particularly in the restricted inland

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[22] See discussion in *Note, Limiting Liability for Own Negligence*, 175 ALR 8, 16 (1948). Practical universality of the practice among towers of inserting in their towage contracts stipulations against liability for their own negligence, is demonstrated both by the motion of *amici curiae* in the court of appeals (reprinted in the *Appendix* hereto) and by the large number of cases in various courts involving such stipulations, cited herein, in the other briefs filed in the two companion cases to this, now pending in this court (*Boston Metals Co. vs The Winding Gulf*, No. 70, and *United States vs Nielson*, No. 210), and in *Note, Towage Contracts—Injury to Tow*, 54 ALR 104, 243 *ff.* (1928).

[23] In which this court's refusal to equate a certain type of towage with bailment was predicated on the distinction that towers of manned vessels "do not have control such as belongs to common carriers and other bailees". 285 US at 200. Judge Coxe, in his dissent in *The Oceanica*, 170 Fed. 893, 896 (CA 2-1909), cert. den., 215 US 559, pointed out that the purpose of rules against contractual limitation of liability for negligence "is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it". See also *Bussey & Co. vs Mississippi Valley Transp. Co.*, 24 La. Ann. 165 (1872).

[24] "The vast interests, which are daily confided to such steam tugs, the hazards to which our internal commerce may be subjected by a want of the highest degree of skill and care on the part of those who command them . . . these considerations urge us very strongly to hold the steam tug to the rigid accountability of a common carrier." *Vanderslice vs The Superior*, FC No. 16,843 (ED Pa.-1850). *Cf.* Frankfurter, J., dissenting, in *United States vs Atlantic Mutual Ins. Co.*, 343 US 236, 244 (1952): Underlying the same rule as to cargo vessels is "the premise that such an agreement, if enforced, would tend to relax the vigilance and care in seamanship which the threat of liability encouraged".

waterways on which towage operations of the class which this case concerns have in recent years reached their apogee.[25]

There is no occasion here to contend for outright repeal in all of its aspects of the oft-stated rule that towage is not synonymous with common carriage.[26] Suffice it to emphasize the postulate that, as this court held expressly in *The Syracuse*, non-equivalence of the two relationships for certain limited purposes, affects in no degree the validity of the common reasons for forbidding, in both, self-exoneration from all responsibility for reckless conduct.

Those reasons have never been epitomized more succinctly than by Judge Coxe in his dissent in *The Oceanica*, in which he said that "it ought to be against public policy to permit a vessel to contract against her own fault", because "to allow her to do so begets recklessness, carelessness and neglect"; and that "the same reasons for prohibiting such a contract in the case of common carriers

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[25] The greatest development in inland water transportation has come since 1925. See Senate Report 433, 76th Cong., 1st Sess., Minority Views, p. 6; Senate Document 152, 73rd Cong., 2d Sess., pp. 1-2.

[26] It should, however, be pointed out that both of the cases usually considered as having established the rule, dealt with towage of manned vessels, not dumb barges. *The Webb*, 14 Wall. (81 US) 406 (1871); *The Margaret* 94 US 494 (1876). In his work on *Bailments and Carriers* (1914) 309-10, Judge Dobie stressed lack of exclusive custody or control as the dominant reason why a tug is not the common carrier of her manned tow. Weighty arguments for a contrary rule for towage of unmanned vessels, were marshaled by the Supreme Court of Louisiana, the leading American civil-law jurisdiction, in *Bussey & Co. vs Mississippi Valley Transp. Co.*, 24 La. Ann. 165 (1872). See also *Vanderslice vs The Superior*, FC No. 16,843 (ED Pa.-1950); and *Alexander vs Greene*, 7 Hill 533 (NY-1844). This court's opinion in *Sturgis* vs *Boyer*, 24 How. (65 US) 110, 122 (1860), seems to connote the same result in its analogy of an unmanned tow, for the purposes of that case at least, to "so much freight".

apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it."[27]

The decision under review is based on the concept that since towers are not common carriers, they have unrestricted license to insert in their contracts such exculpatory clauses as their superior trading position may allow.

That concept is inconsistent with present-day recognition of the necessity, arising from increasing crystallization and stratification of the economy, for regulation of the relationships arising from most established business statuses[28]—a necessity which has been felt particularly strongly in the field of transportation;[29] and has not forestalled preclusion of limitation of negligence liability in bailments for hire,[30] to which, as pointed out, towage of unmanned barges is essentially similar in its relevant aspects.

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[27] 170 Fed. 893, 896 (CA 2-1909), cert. den., 215 US 599.

[28] "The present trend away from the freedom of contract and toward status is evidenced by the geometrically accelerated return to thrust-law, relational obligations in the form of standardized contracts, administrative board regulations, *et cetera*. Thompson, *Some Current Economic and Political Impacts in the Law of Contract*, 26 Cornell Law Quarterly 4, 13 (1940)." *Note, Ibid.*, 304.

[29] "This country is definitely committed to the theory of regulating all interstate transportation for the public." House Report 1217, 76th Cong., 1st Sess., p. 2. The subject of the cited report was the bill which eventually became the Transportation Act of 1940, regulatory of various types of transportation by water, including towage. See footnote 20 *supra*.

[30] See *Note, Limiting Liability for Own Negligence*, 175 ALR 8, 110 *ff.* (1948).

The decision under review is grounded on the same error as was *Mengel Co. vs Inland Waterways Corporation,*[31] which, in the words of one commentator, "stressed . . . the 'paramount public policy' in favor of freedom of contract", relying principally "upon the well-known opinion of Sir George Jessel, M. R., in *Printing Co. vs Sampson* (1875): 'If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting' ".

The commentator adds: "This general philosophy, however, has less standing today than it did in Jessel's time. Moreover, it is not to be denied that one will be more careful and diligent when he stands beneath the Damoclean sword of liability for his negligence. This, in essence, was the theory upon which *The Syracuse* and the cases following it were based." [32]

Nothing in *Stevens vs The White City* or *Sun Oil Co. vs Dalzell Towing Co.* justifies departure from the rule of *The Syracuse* and *The Wash Gray.*

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[31] 34 FS 685 (ED La.-1940).

[32] *Note,* 26 Cornell Law Quarterly 303, 304 (1941). It may be noted at this point, that British decisions upholding release-towage agreements [such as *The Albion* (1953) 2 All ER 679 (CA)], bear no analogy to the case at bar. Those decisions were rendered in express or tacit recognition of the circumstance that the types of towage largely prevailing in England are harbor and docking maneuvers and deep-sea operations, all involving manned, self-propelled vessels. The resultant inapplicability of English towage precedents to American cases involving towage of unmanned river and canal barges, has been recognized by both English and American courts. See *The American* (1874) LR 6 PC 127; *The Belknap,* FC No. 1244 (DC Mass.-1873). Besides, as a matter of judicial tradition in Great Britain, even "common carriers, by land or sea" were, until adoption of relatively recent statutory restrictions, unqualifiedly "permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants". *Liverpool Steam Co. vs Phenix Ins. Co.,* 129 US 397, 447 (1889).

As noted above, the refusal in the *Stevens* case to equate towage of manned vessels to bailment for purposes unrelated to limitation of liability, has not been extended by the lower admiralty courts for any purpose to towage of helpless barges—individual manning of which would often be a practical impossibility [33]—under the complete domination and absolute control of their tugs.

On the contrary, the courts have evolved rules of law governing towage of unmanned vessels so nearly approaching those applied to common carriers and other professional bailees, that respondent seized on them in support of its argument below, as paraphrased by the court of appeals, that "the situation of a tug with a dumb tow makes it more necessary for it to relieve itself of what may approach an insurer's liability".[34]

The *Sun Oil* holding is similarly inapropos to the situation at bar.

There are obvious fundamental relational differences between mere assistance by tugs in docking a manned and self-propelled vessel operating under her own steerageway, power and command; and towage of large fleets of unpowered and unmanned cargo barges belonging to different owners.

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[33] Cargo barge flotillas have consisted of as many as "forty and fifty barges at a time". Rosskam, *Towboat River* (1948) 17, 18, 59. See also Durant, *Pictorial History of American Ships* (1953) 282; *The Belknap*, FC No. 1244 (DC Mass.-1873). *The Syracuse* involved a forty-barge tow. The fleet involved in the tow in the instant case consisted of eight unmanned cargo barges belonging to different owners. R 23.

[34] R 37; 211 F2d at 403. See respondent's brief in the court of appeals, p. 15, citing *The Webb*, 14 Wall. (81 US) 406 (1872); *Sternberg Dredging Co. vs Moran Towing & Transp. Co.*, 196 F2d 1002, on rehearing, 200 F2d 603 (CA 2-1952); and *Simkins vs R. L. Morrison & Sons*, 107 F2d 121 (CA 5-1939). In *Sturgis vs Boyer*, 24 How. (65 US) 110 (1860), this court delineated some of the legal consequences of the clear distinction between towage of manned and unmanned vessels.

The language of the *Sun Oil* opinion makes clear that the validity of the pilotage clause in that case was based on the presence of the master of the assisted vessel at his station in command of his own crew and of his ship—proceeding under her own power and steerageway—with authority to direct and even to remove the pilot.[35]

As stated by the Southern District of New York, the *Sun Oil* decision was not intended to upset the long-standing proscription of towers'-release clauses, but only to establish a particular rule for the "special case . . . when the tow is under power and in control of the tower's (tow's) servants".[36]

Conformably to this view, the Sixth Circuit has declined to extend the rule of the *Sun Oil* case even to a harbor maneuver performed under the assisted vessel's own power and steerage, with her master in command, when the

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[35] The fact that there is a pilot on the bridge does not alter the master's ultimate command of his vessel: "The master need not have allowed the pilot to conduct the navigation unless he was satisfied to trust it to him, and if dissatisfied he could have removed him." *The West Eldara*, 101 F2d 45, 47, mod., 104 F2d 670 (CA 2-1939), cert. den., 308 US 607.

[36] *Petterson Lighterage & Towing Corp. vs The J. Raymond Russell*, 87 FS 467, 470 (SD NY-1949). Accord: *Hall-Scott Motor Car Co. vs Universal Ins. Co.*, 122 F2d 531 (CA 9-1941), cert. den., 314 US 690. "If it be intimated that *Sun Oil Company vs Dalzell Towing Company, Inc.* may have modified the other two cases (*The Syracuse* and *The Wash Gray*), it is submitted, however, that the last case stands alone on its peculiar facts." *Note*, 28 Cornell Law Quarterly 194, 195 (1943). There would simply seem to be no basis for the very recent gratuitous assumption by the Court of Appeals for the Second Circuit that *Sun Oil Co. vs Dalzell* "is to be taken as, in effect, accepting the doctrine of the *Oceanica*". *North River Barge Line vs Chile SS Co.*, 213 F2d 882, 884 (CA 2-1954).

tug captain acted "on his own initiative, without subordination to" the master of the assisted vessel.[37]

CONCLUSION

In light of the considerations hereinabove expressed, it is respectfully submitted that no greater justification appears for judicial alteration of the established and salutary rule against contractual exemption from liability for their own negligence by towers of unmanned vessels, than appeared in *United States vs Atlantic Mutual Insurance Co.* for changing the same rule as applied to common carriers by water;[38] that the opinion under review is accordingly erroneous; and that that decision should be reversed and the cause remanded to the district court with directions to enter judgment for petitioner.

EBERHARD P. DEUTSCH
Proctor for Petitioner

DEUTSCH, KERRIGAN & STILES

RENÉ H. HIMEL, JR.

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November, 1954

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[37] *Great Lakes Towing Co. vs Bethlehem Transp. Corp.*, 65 F2d 543, 544 (CA 6-1933). Accord: *Great Lakes Towing Co. vs American SS Co.*, 165 F2d 368 (CA 6-1948), cert. den., 333 US 881. See also *American South African Line vs Sheridan & Co.*, 1936 AMC 287 (ED Pa.). Contra: *Boston Metals Co. vs The Winding Gulf*, 209 F2d 410 (CA 1-1954), cert. gr., October 14, 1954, US , No. 70 on the docket of this court for the present term.

[38] 343 US 236, 242 (1952): "Here, once more, 'we think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests' of the varied groups who would be affected by permitting carriers to deviate from the controlling rule that without congressional authority they cannot stipulate against their own negligence or that of their agents or servants. If that rule is to be changed, the Congress, not the shipowners, should change it."

APPENDIX

Motion For Leave To File Brief As Amici Curiae
(In the Court of Appeals)

Now come Selim B. Lemle, Charles Kohlmeyer, Jr., and George B. Matthews and show that they are counsel for American Barge Lines, Inc., Coyle Lines Incorporated, Crescent Towing & Salvage Co., Inc., Dixie Carriers, Inc., John I. Hay Company, Mississippi Valley Barge Line Company, Mobile Towing & Wrecking Co., and Union Barge Line Corporation; that Crescent Towing & Salvage Co., Inc. and Mobile Towing & Wrecking Co., Inc. are the owners and operators of large fleets of habor tugs in New Orleans and Mobile respectively; and that all of the other parties are owners and operators of feets of river towboats and barges plying the Mississippi River and its tributaries and the Intracoastal Canal.

Movers show that the parties all perform towing services for each other and the public at large under towage contracts containing provisions for the release from liability of towing craft for its negligence substantially similar to the release clause, the validity of which has been attacked in the instant case; that the interpretation placed on the release clause will have a material effect upon the methods of doing business of all the parties whom movers represent; and accordingly movers pray for leave to file the attached brief as *Amici Curiae* in support of Appellee.

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No. 50

In the Supreme Court of the United States

October Term, 1954

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 50

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO., PETITIONER

v.

INLAND WATERWAYS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The court below has held valid and enforceable clauses in a towage contract placing all risks of the operation on the craft to be towed and declaring the master and crew of the towing vessel to be servants of the tow. Clauses such as these are in common use by towing companies throughout the United States, and the issues of their scope and validity, involving as they do critical questions of judicial policy towards the abdication of responsibility for tortious conduct, are of major importance to the entire shipping industry. Similar provisions have been before this Court three times in the past seventy-five years: *The*

Syracuse, 12 Wall. 167, *Compania de Navegacion Interior* v. *Fireman's Fund Insurance Co.,* 277 U. S. 66, *Sun Oil Co.* v. *Dalzell Towing Co.,* 287 U. S. 291. These opinions, however, have been given conflicting interpretations by the lower courts and by commentators.* Only this Court can now render a definitive reading of these decisions and settle the validity of a common practice affecting an entire industry which is of peculiar concern to this Court.

An unusual opportunity to bring order to this area of the law is presented at this time by the pending petitions for writs of certiorari in this case and in *Boston Metals Co.* v. *S. S. Winding Gulf,* No. 70, October Term 1954, and by a petition which will shortly be filed by the United States, in *Neilson, as Owner of the Tug Dauntless #6* v. *United States,* 209 F. 2d 958 (C. A. 2). Together, these three cases present the issue of the validity and effect of the disputed clauses in actions (1) by the tow against the tug, (2) by a third party against the tow, and (3) by the tug

*Compare, for example, the decision of the Fifth Circuit below, 211 F. 2d 401, with those of the Ninth Circuit in *Mylroie* v. *British Columbia Mills Tug and Barge Co.,* 268 Fed. 449, and *Alaska Commercial Co.* v. *Williams,* 128 Fed. 362. There is, moreover, a possibility of internal inconsistency in the decisions of this Court. See the opinion of the district court below (R. 35–40). The uncertain state of the law is emphasized by the fact that of two leading authors on admiralty, one regards the clauses as valid, 1 *Benedict, Admiralty* § 100 (6th ed. 1941), and the other regards them as invalid, *Robinson, Admiralty* 664, 672 (1939).

against the tow. It may be noted that the United States is peculiarly affected by the confusion which exists in this area, as exemplified by the opposite views which it represented below in *Neilson* (the tow) and the instant case (the tug). This circumstance itself is indicative, we believe, of the necessity for a clear and authoritative rule. Consequently, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

JUNE 1954.

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OCTOBER TERM, 1954

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT COMPANY, PETITIONER

v.

INLAND WATERWAYS CORPORATION

ON [redacted] WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 27–31) is reported at 114 F. Supp. 713. The opinion of the court of appeals (R. 35–38) is reported at 211 F. 2d 401.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1954 (R. 39). The petition for a writ of certiorari was filed on April 26, 1954, and was granted on October 14, 1954 (R. 41). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether exculpatory clauses in a towage contract, which provide that the operation is conducted at the sole risk of the tow and that the master and crew of the tug are deemed to be servants of the tow, are valid and may be interposed in defense of an action brought by the owner of the tow for damage incurred through the negligence of the tug.

2. Whether, assuming that such clauses are generally valid, they are nonetheless void in the situation presented by the instant case, *i. e.*, where the tow is an unmanned, unpowered barge.

STATEMENT

The barge Bisso #9 was owned by New Orleans Coal and Bisso Towboat Company (of which company petitioner is now the receiver)[1] when, on May 12, 1944, in tow of respondent's tug CAIRO, it struck a bridge pier near Greenville, Mississippi, and sank. The agreement of towage provided in pertinent part (R. 11–12):

> (4) The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo and neither the boats and/or any other equipment used in said service nor the owner, charterer, or hirer thereof shall be liable for any loss or damage to the "craft to be towed" or its cargo

[1] We shall use the term "petitioner" to refer either to the company or to the receiver.

> nor for any damage done by the "craft to be towed," however occurring. The masters and crews and employees of all boats and/or other equipment assisting the "craft to be towed" shall, in the performance of said service, become and be the servants of the "craft to be towed," regardless of whether the "craft to be towed" assists in the service in any way and irrespective of whether they be aboard the "craft to be towed" or in command thereof. Nothing herein contained, however, shall be construed as making the "craft to be towed", its owners, charterers or operators liable or responsible for loss of or damage to the property of FEDERAL BARGE LINES or third parties or for loss of life or personal injury for which the "craft to be towed" its owners, charterers or operators would not otherwise be liable or responsible.[2]

The facts relating to the mishap are undisputed and may be summarized as follows:

The BISSO #9 was one of eight unmanned and unpowered barges which the CAIRO took in tow at New Orleans, bound for Cairo, Illinois. On approaching the three-span bridge near Greenville, the CAIRO, with the BISSO #9 and three other barges

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[2] The contract was between petitioner's lessee, National Oil Transport Corporation, and respondent. There is no dispute that National was explicitly authorized by petitioner to accept a provision of the type set out above. See R. 22, 25.

in tow, tried to pass under the eastern span.[3] Forced by the strong current and a dangerous eddy to give up this attempt, the flotilla dropped back approximately 1,000 feet and attempted to pass under the center span. Under the middle of this span, the flotilla lost all headway. Emergency full ahead was ordered, but, just after the flotilla began to move forward again, a "boil" or turbulence in the water forced the head of the tow toward the east bank.[4] The flotilla "crabbed" to starboard, one barge struck the pier, and the consequent impact snapped a coupling wire of the BISSO #9, which was then swept up against the pier, where she buckled, turned over, and sank. (R. 23–24.)

The district court found (R. 25) that, considering the known conditions of river navigation at that point, the CAIRO was negligent in attempting to pass under the bridge, with four loaded barges, from a position dead in the water only a thousand feet distant. The court held that the "release clause" (that portion of the contract—quoted above—placing the sole risk of the operation on the tow), standing alone, was insufficient to relieve the CAIRO from liability for its negligence, but

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[3] The tow had been split up near Vicksburg and subsequently "double tripped," *i. e.*, moved alternately in groups of four barges, because of high waters and dangerous conditions on the river above (R. 23).

[4] As is ordinarily the case on the Mississippi River, this flotilla was made up with the barges in front and the tug pushing (R. 23).

that the "pilotage clause" (that portion—also quoted above—declaring the crew of the tug to be servants of the tow),[5] when read with the "release clause," unequivocally evidenced the intention of the parties to exonerate the tug from liability to the tow. (R. 26, 31.) Holding that such an agreement, when unequivocally expressed, is enforceable (R. 26), the court dismissed the libel (R. 32). The court of appeals, affirming the judgment, held that either the "release clause" or the "pilotage clause" was sufficient to exculpate the tug owner (R. 38).

SUMMARY OF ARGUMENT

I

Petitioner's broad contention that exculpatory provisions in towage contracts should be deemed invalid has been explored in the brief for the United States in *United States* v. *Nielson,* No. 210 (to be argued with this case). We there suggested that it did not appear that public policy required such provisions to be held completely void; that, however, considering the importance and the hazardous nature of towage, it was highly desirable to avoid sterilization of that incentive

[5] While the clause does not relate solely to the status of the pilot but to that of the master and the entire crew, the courts below used the term "pilotage clause" because of the provision's essential similarity to the clause involved in *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291. For convenience, we have adopted the same terminology.

to care which is rooted in the fear of loss; and that, for this reason (as well as reasons based upon the interpretation of the contract there involved), a tug should not be permitted to recover for its own damage resulting from the negligence of its own employee.

In the instant case, the tug owner (respondent) is not seeking an affirmative recovery. It seeks only to hold the tow owner (petitioner) to the clear and unequivocal undertaking to assume the risk of property damage to the towed barge and its cargo. Indeed, under the type of contract here involved (a standard form contract used by respondent), the tug owner expressly retained the risk of damage to its own property and the risk that third parties might suffer property damage, personal injury or loss of life. There is no reason to suppose that such a contract would dilute the incentive to care.

Unless, therefore, the Court should conclude that all exculpatory provisions in towage contracts are to be proscribed, it seems plain that the type of provision here involved should be enforced.

II

Petitioner argues, alternatively, that, even if exculpatory provisions are enforced in some cases, they should not be sanctioned when the tow is an unmanned vessel. There is no basis either in precedent or in sound policy for drawing such a

line. So far as the element of control is concerned, active direction and management of the essential functions of towage are necessarily gathered in the hands of the tug's employees whether or not the tow owner elects to man the tow.

Petitioner also contends, in similar vein, that when the tow is unmanned the tug is its bailee and that this Court should adopt a strict rule against exculpation by bailees for hire. But "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo," *Stevens* v. *The White City*, 285 U. S. 195, 200. The owner of the tow has the option to man it and is in no position to complain when he chooses not to do so. *Ibid.*

ARGUMENT

I. The validity of exculpatory provisions in towage contracts has not been definitively settled. Unless, however, those provisions are to be condemned in gross, petitioner here should not be relieved of its undertaking to assume the risk of injury to the towed barge and her cargo

Petitioner argues broadly (Br., pp. 13–14), in the language of Judge Coxe's dissenting opinion in *The Oceanica*,[6] "that 'it ought to be against public policy to permit a vessel to contract against her own fault', because 'to allow her to do so begets recklessness, carelessness and neglect'; and

[6] 170 Fed. 893, 896 (C. A. 2), certiorari denied, 215 U. S. 599.

that 'the same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it.'" Petitioner further argues that, even if such exculpatory clauses should be deemed permissible in the case of a tug towing a manned vessel, they should be struck down in the situation where the towed vessel is unmanned.

The question of the general validity of exculpatory provisions in towage contracts is also presented in *United States* v. *Nielson,* No. 210 (to be argued with this case). In *Nielson,* the United States, as owner of the towed vessel, was sued by the owner of a damaged tug on the theory that the contract there involved made the docking pilot (who was in the general employ of the tug) the "lent servant" of the tow, and that the tug was not only exculpated from liability for negligence but could affirmatively recover from the tow for the damage suffered by the tug in consequence of the pilot's negligence. The permissibility of a contractual provision exonerating the tug from the consequence of its negligence thus lies at the threshold of both cases. Instead of repeating *in extenso* the discussion of that ques-

tion which appears in the Government's brief in No. 210, we respectfully refer the Court to that brief (see pp. 10–29) for a statement of our position. In summary, the position elaborated in No. 210 is as follows:

(1) Exculpatory clauses, seeking to shift from tug to tow the tug owner's responsibility for the negligence of his employees, have been incorporated in towage contracts for many years. Their status in the courts, however, has long been unclear. On two occasions, in cases involving a "release clause" (*i. e.,* a clause declaring that all risks of the operation should be upon the tow), the Court declared in general terms that the towing vessel must be visited with the consequences of its own negligence. *The Syracuse,* 12 Wall. 167; *Compania de Navegacion Interior* v. *Fireman's Fund Insurance Company* (commonly known as *The Wash Gray*), 277 U. S. 66. In a third case, however, this Court permitted enforcement of a "pilotage clause" (a clause seeking to render the tugboat captain, while aboard the tow, in legal effect the "lent servant" of the tow). *Sun Oil Co.* v. *Dalzell Towing Company,* 287 U. S. 291. While the lower federal courts have, for the most part, assumed that *Sun Oil* broadly licensed the use of exculpatory provisions, the facts are consistent with a much more limited interpretation. In that case, the tugboat captain was actually performing the work of the ship (piloting

her, under her own power, in the open channel) when the mishap (running the vessel aground through an error of navigation) took place. Whether the Court would have reached the same result if an accident had occurred as a result of the tug captain's negligence in directing the performance of towage from the bridge of the tow is uncertain.

(2) Congress has not considered the question whether exculpatory provisions in towage contracts should be permitted. Moreover, the policies reflected in Congressional enactments relating to other aspects of water transportation furnish little guidance.

The courts have not looked with favor upon contracts exonerating a party from liability for its own negligence and such contracts, where permitted (as they have been in many situations), are always strictly construed against the party seeking exculpation. Whether public policy absolutely forbids enforcement of such a contract depends upon analysis of the relevant factors to determine whether there is gross unfairness between the parties or reason to apprehend serious detriment to the public interest.

So far as fairness between the parties is concerned, it is evident that the size and resources of tugboat companies as a class are not such as to indicate that they are in a position to dominate their patrons. Nonetheless, these companies have

considerable bargaining power by virtue of the strategic position which they occupy. Moreover, it appears that they have followed a parallel course of action and that the patron may find it very difficult to secure towing service without acceding to an exculpatory provision.

The fact that agents of the tow may be aboard her when towing service is provided furnishes little reason for permitting tug exculpation. In the actual performance of the towage operation, which the tugboat company is hired to direct and conduct because of its special know-how, equipment, and capabilities, effective direction and control passes completely into the hands of the tug company's employees.

There is, however, some economic justification for the tug's effort to shift risk. The operation is inherently hazardous and slight negligence may easily result in serious loss. And the value of the tow or its cargo is often highly disproportionate to the value of the tug.

The very hazards of the operation, however, make it especially important that there be no relaxation of that vigilance which the threat of liability encourages. Perhaps, a sufficiently strong sanction against carelessness by the tug company (which is, of course, a threat to personal safety as well as to property) is the great vulnerability of tugs in the event of mishap. It is accordingly of crucial significance, from the stand-

point of the policy considerations, that the broad rule sought by the respondent in the *Nielson* case not only would permit exculpation from liability but would also permit the tug company to recover for its own loss.

Balancing the various considerations, it does not appear that the factors weighing against exculpation are so strong and compelling as to require a holding that the industry practice is to be proscribed and exculpatory clauses deemed entirely void. In no event, however, should a tug company be permitted to recover for its own loss consequent upon the negligence of its own employees in the performance of towage. There is every reason to apprehend that such an extreme departure from the salutary principle that responsibility should accompany control would come close to destroying the incentive to care which the public interest demands.

In short, we suggested in *Nielson* that it did not appear that public policy required exculpatory provisions in towage contracts to be held completely void; that, however, considering the importance and the hazardous nature of towage, it was highly desirable to avoid sterilization of that incentive to care which is rooted in the fear of loss; and that, for this reason (as well as reasons based upon interpretation of the contract there involved), a tug should not be permitted to recover for its own damage resulting from the

negligence of its own employee. We would emphasize that this evaluation of the policy factors is not one tailor-made to enable the Government to prevail in both cases. The Government has widely adopted in its capacity as tug owner the practice which it suggests to the Court best conforms to the requirements of sound public policy. The contract in the instant case (which is a standard form contract of Inland Waterways Corporation, R. 9–10), while it provides that the tow owner shall assume the risk of damage to the tow, does not seek to make the tow the insurer of the tug. It states (R. 12): "Nothing herein contained, however, shall be construed as making the 'craft to be towed,' its owners, charterers or operators liable or responsible for loss of or damage to the property of Federal Barge Lines [operating subsidiary of Inland Waterways] or third parties or for loss of life or personal injury for which the 'craft to be towed,' its owners, charterers or operators would not otherwise be liable or responsible."

Unless exculpatory provisions are to be condemned in gross, there is no reason to relieve this petitioner of its undertaking to assume the risk that its barge would be damaged or destroyed. There is no dispute that the contract unequivocally expresses the intention to relieve the tug owner of liability to the tow. And the policy reasons which suggest a holding against the tug

owner in *Nielson* have no counterpart here. This is a pure case of limitation of liability. It is not a case in which the negligent party (the tug owner) seeks an affirmative recovery.

II. In determining the validity of exculpatory provisions in towage contracts, no valid distinction can be drawn between the case in which the tow is manned and the case in which it is "dumb"

Resting on the fact that the BISSO #9 was unmanned during the course of the towing operation which resulted in the mishap, petitioner argues that, even if exculpatory provisions are valid in some circumstances, they are to be denied enforcement when the tow is "dumb" and within the complete control of the tug's employees. Such a distinction has no basis either in precedent or in sound policy.

Petitioner argues, first, that in *The Syracuse*, 12 Wall. 167, and *Campania de Navegacion Interior* v. *Fireman's Fund Insurance Co.* (*The Wash Gray*), 277 U. S. 66, this Court determined that exculpatory provisions in towage contracts are generally contrary to public policy. This is a permissible interpretation of those cases, although they have also been widely and plausibly interpreted as standing simply for the proposition that exculpation from liability for negligence will be permitted only when the language of the contract unequivocally evinces that intention by the parties. See the Government's brief in No. 210,

pp. 11–14, and brief of Selim B. Lemle, *amicus curiae* in this case, pp. 5–14.

Faced, then, with the necessity of explaining this Court's subsequent holding in *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, which shows at least that exculpatory clauses are not invalid in all circumstances, petitioner declares (Br., p. 10) that the first two cases involved unmanned tows and *Sun Oil* a manned tow. This is not so. While *The Syracuse* is silent as to whether the towed vessel in that case (a canal boat) was manned or unmanned, it is perfectly plain in *Campania de Navegacion Interior* that master and crew were aboard the towed vessel (*The Wash Gray*). 277 U. S. at 72–73.

Sun Oil, in our view, is susceptible of either of two interpretations: (1) that exculpation for negligence is generally permissible when the intention of the parties to accomplish that result is expressed with sufficient clarity; (2) that exculpation was permissible in the circumstances there presented because the provision of the contract was clear *and* because the general employee of the tug (the docking pilot) was in fact doing the work of the tow when his negligence caused the accident. Neither interpretation, and nothing stated in any opinion of this Court, supports the view that the line should be drawn where petitioner suggests.

Petitioner also argues, in similar vein, that the CAIRO should be regarded as the bailee of the

"dumb" BISSO #9 and that the Court should invoke the "considerations precluding contractual exemption of a bailee for hire from liability for his negligence" (Br., p. 12). Even if there were a broad rule of law that a bailee for hire has no power to limit his liability for negligence by contract,[7] petitioner would be faced with the fact that "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo," *Stevens* v. *The White City*, 285 U. S. 195, 200.

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[7] For an indication of the wide diversity of views as to the circumstances in which a bailee for hire should be permitted to contract against liability for negligence, see Note, *Limiting Liability for Own Negligence*, 175 A. L. R. 8, 111 *et seq.* See, also, *Restatement, Contracts*, Sections 574, 575.

The rule assumed by petitioner is particularly doubtful in marine bailments. See *International Mercantile Marine S. S. Co.* v. *W. & A. Fletcher Co.*, 296 Fed. 855 (C. A. 2); *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, 34 F. 2d 100 (C. A. 4); *Hall-Scott Motor Car Co.* v. *Universal Insurance Co.*, 122 F. 2d 531 (C. A. 9).

The concurring opinion of Judge Clark in *Turecamo Towing Corp.* v. *United States*, 125 F. 2d 1001, 1002 (C. A. 2), which the petitioner cites to show that there is authority for imposing a bailee's obligation upon the tug of an unmanned and unpowered tow, has reference only to the possibility of enforcing against such a tug the bailment rule that proof of loss makes out a prima facie case of negligence on the part of the bailee. A similar rule has been imposed even when the court has expressly disavowed the existence of the bailment relationship. *Sternberg Dredging Co.* v. *Moran Towing & Transportation Co.*, 196 F. 2d 1002, 1006, opinion on rehearing, 200 F. 2d 602, 604 (C. A. 2).

In *Stevens* v. *The White City,* the side of a towed vessel was unaccountably dented during the period that it was in tow. The owner maintained "that the tug was bailee for hire and that, by proving the tug received the tow in good order and delivered it in a damaged condition, he made a prima facie case of negligence which cast upon such bailee the burden of showing the circumstances surrounding the damage" (p. 198). It is to be noted that while a man was aboard the tow during the first part of the operation, he left the vessel, apparently before the damage occurred (p. 199). Thus, the tow was "dumb" and, from the standpoint of the relationship of the parties, the situation was exactly the same as it is in the instant case. Pointing out that the tow owner had a right to keep a man on board the tow (as, of course, is equally true of petitioner here), the Court declared it "immaterial" (p. 201) that he chose not to do so and restated the conclusion, reached in a number of prior decisions (see cases cited at pp. 200, 201), that towage contracts do not create bailor-bailee relationships.

Petitioner fails to point to any persuasive consideration which would justify a special and stricter rule relating to exculpation in the unmanned-tow case. So far as the factor of control is concerned, there can be no doubt that active control and direction of the essentials of the towage operation are necessarily in the hands of the

tug's employees whether or not the tow is manned. See Gov't brief in No. 210, p. 26. And, in any event, the choice of manning the tow or leaving it unmanned is that of the tow owner. *Stevens* v. *The White City, supra.*

Certainly, as we argue in No. 210, it is desirable that tugs, which necessarily control towage operations, should retain in significant measure that incentive to vigilance which derives from the risk of economic loss. But that is no argument for a more stringent rule against exculpation in the case of unmanned tows. Since the element of personal safety is involved in greater degree when the tow is manned—consider, for example, the case of a passenger ship being maneuvered to its berth in a congested harbor—the circumstance that a tow is "dumb" suggests, if anything, a more liberal rule. In any event, however, it is our position (Point I, *supra*) that under the type of towage contract here involved the incentive to vigilance is adequately preserved, for the tug owner retains a very substantial financial stake in the safe conduct of the operation, notwithstanding the barge owner's assumption of risk of property damage to the barge and its cargo. It is because of this—and, likewise, because of the absence of corresponding factors in the position taken by the tug owner in *Nielson*—that we urge affirmance here and reversal in No. 210.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1954

No. 50

THE BISSO NO. 9

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.,
Petitioner,

versus

INLAND WATERWAYS CORPORATION,
Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 50

THE BISSO NO. 9

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.,
Petitioner,

versus

INLAND WATERWAYS CORPORATION,
Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

THE INTEREST OF THE AMICUS CURIAE

This brief is presented with the written consent both of Petitioner and Respondent,[1] in support of the position of the Respondent, and in the interest of a number of clients, some of whom[2] are the owners and operators of fleets of river towboats and barges plying the Mississippi River and its tributaries and the Intracoastal Waterway,[3]

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[1] On file with the Clerk.

[2] American Barge Line, Inc., Coyle Lines Incorporated, John I. Hay Company, Mississippi Valley Barge Line Company and Union Barge Line Corporation.

[3] Inland waterways between Brownsville, Texas on the west and Carrabelle, Florida on the east.

and the others are the owners and operators of large fleets of harbor tugs in New Orleans [4] and Mobile,[5] respectively.

All of these parties, who constitute a small but important segment of the towing industry, for a number of years have performed and are performing towage services for each other and the public under contracts providing for the release from liability of the towing craft for its negligence substantially like the release clause whose validity has been attacked in the instant case. Accordingly the interpretation placed on such release clauses will have a material effect upon the methods of doing business of all of these parties.

THE QUESTION PRESENTED

The question presented for review is generally whether a tug owner may contract against liability for damage occasioned to the tug's tow by negligence of the tug. This question arises through the application in this case of a clause in a towage contract [6] which releases the towing vessel and its owner from liability for damage to its tow and in addition contains what is commonly denominated a "pilotage clause" which provides that the master, crew and employees of the towing vessel shall,

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[4] Crescent Towing & Salvage Co., Inc.

[5] Mobile Towing & Wrecking Co., Inc.

[6] R 11-12. "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the [tow] boats and/or any other equipment used in said [towage] service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.

"The master and crews and employees of all [tow] boats and/or other equipment assisting the 'craft to be towed', shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

in the performance of the towage service, become and be the servants of the tow, regardless of whether the tow assists in the service in any way and regardless of whether or not such personnel be on board the tow or in command thereof.

The finding that the Barge BISSO NO. 9 was lost by reason of the negligent navigation of respondent's Towboat CAIRO is unchallenged, and therefore the question is squarely presented whether the Towboat CAIRO and her owners are released from liability under the clause in question, for the negligent navigation of the towboat—simple negligence.

SUMMARY OF ARGUMENT

No decision of this Court has declared invalid a towage contract wherein a tower has contracted unequivocally against liability for negligent towage; and the weight of authority in the District and Appellate Federal Courts has approved such contracts. In addition, this Court has specifically approved the validity of the so-called "pilotage clause".[7]

Public policy does not prohibit release liability clauses in towage contracts, but on the contrary, the highest public policy is found in the enforcement of the contract into which the parties have entered.

The Congress of the United States has never prohibited stipulations for the release from liability for damage to the tow occasioned by the negligence of the towboat's master and crew, but on the contrary, has extended to those towers subject to Part III of the

[7] A clause of similar import to the second paragraph of the clause quoted in the preceding note.

Interstate Commerce Act the protection of the Harter Act and of the Carriage of Goods by Sea Act, thus exempting such towers from liability for negligence of the towboat's master and crew.

This Court should not now, by a judicial pronouncement, declare invalid a practice which has existed for so long a time, which has so frequently received judicial sanction, and which, if now forbidden, would create the anomaly that common carriers subject to Part III of the Interstate Commerce Act when performing towage, would have an exemption from liability for the negligence of their towboats' masters and crews not afforded to private carriers performing similar towages and for which those private carriers would be forbidden to contract.

ARGUMENT

The Jurisprudence

The crux of the Petitioner's argument is that in *The Syracuse* [8] this Court established a rule, reiterated in *The Wash Gray*,[9] that a tower cannot contract against liability for damage to the tow occasioned by the towboat's negligence. This is a misconception of the holding of these two cases. All that was decided was that the release clauses in the respective towage contracts therein construed were ineffectual because they did not evidence any clear intent to relieve the tower from liability for negligence of the master and crew of the towing vessel. This is the construction that has been put upon these cases, not only by a number of the District and Appellate Federal Courts, but also by this Court in *Sun Oil Com-*

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[8] 12 Wall. (79 U.S.) 167 (1871).

[9] 277 U.S. 66 (1928), officially titled *Compania de Navegacion, Interior, S. A. v. Fireman's Fund Ins. Co.*, but universally cited as *The Wash Gray*.

pany v. Dalzell Towing Company [10] wherein Your Honors approved the "pilotage clause". It was there argued that to hold that clause valid would create a conflict with the holdings in *The Syracuse* and *The Wash Gray*. Your Honors disposed of this argument by saying that the release clauses involved in those two cases were not similar to the clause under consideration in the *Sun Oil Company-Dalzell Towing Company* Case.[11]

An analysis of the jurisprudence clearly demonstrates the fallacy of Petitioner's position.

It would serve no useful purpose to review or analyse the jurisprudence prior to this Court's decision in 1871 in *The Syracuse*.

In *The Syracuse*, the owner of a canal boat, lost while being towed from Albany to New York, sought a recovery for the value of the boat, charging that the towing vessel was a common carrier. The respondent, owner of the towing vessel (the SYRACUSE), claimed that the towage was performed under a contract which provided that the canal boat was to be towed "at the risk of her master and owners", and that liability was released in advance, but this Court held the defense unavailing. The summary of the argument of eminent admiralty counsel for the Steamboat SYRACUSE (Mr. Benedict), reported in the official reports of the case,[12] indicates that he did not approach the problem with any thought that the interpretation of the towage contract would be the principal point in the case. His argument

[10] 287 U.S. 291 (1932).

[11] "The decree under consideration is not in conflict with the decisions of this Court cited by petitioner, *The Steamer Syracuse*, 12 Wall. 167, and *Compania de Navegacion v. Ins. Co.*, 277 U.S. 66, 48 S. Ct. 459, 72 L. Ed. 787. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns." (287 U.S. 295).

[12] 12 Wall. (79 U.S.) 167, 170.

was directed to the factual issue of whether or not the SYRACUSE was negligent in the handiing of the tow, and apparently he did not even attempt to convince the court that all risks of navigation, including the risk of negligent towage, had been assumed by the tow. It is to be borne in mind that the canal boat was under the control of its own crew during the towage, so the "risks" assumed might have been those of navigation and non-marine perils, as well as the risk of negligence of the SYRACUSE. This was certainly Mr. Benedict's conception of the issue, for he argued that "he [the master of the canal boat] would bear the risks of navigation, provided the steamboat which furnished the propulsion power was navigated with ordinary care and skill."

Because of this presentation, it is not surprising that the question which all counsel today agree was the important one did not then seem to be of any great moment. The meaning of the release clause was disposed of in one short paragraph, and the decision was affirmed on a finding that the damage to the canal boat was occasioned through the negligence of the steamboat. Mr. Justice Davis, who delivered the opinion of the court, held that even though the canal boat was being towed at her own risk, the steamer was nevertheless liable for the damages if the canal boat suffered a loss through the negligent navigation of the steamer. He pointed out that, although the steamboat was not required to tow as a common carrier, she was required to exercise reasonable care, caution and maritime skill, and that if those factors were neglected and a disaster occurred, liability must be visited upon her.

When *The Oceanica* [13] came before the Second Cir-

[13] 170 Fed. 893 (2 C.C.A. 1909).

cuit Court of Appeals in 1909, thirty-nine years after *The Syracuse*, the ruling as to the meaning of a release clause in a towage contract was questioned in no uncertain terms. The OCEANICA was a steam vessel whose owners agreed to tow a barge, the MASSASOIT, under a contract which contained a clause that the MASSASOIT was to assume all risks. During the course of the voyage, the tug broke her propeller, cut her tow lines and permitted the barge to fetch up on a pier, where it became a total loss. In a libel by the tow's owner for their damages, the defense was that the towing vessel had been released from negligence. The majority of the Court upheld this contention, saying:[14]

> "We are confronted at the outset of the case with the preliminary question whether the agreement made released the tug and her owners from liability for the loss of the tow, even if it was due to the negligence of those in charge of the tug. In this state [New York] a common carrier may contract against his own negligence; but such a contract will not be construed to cover the carrier's negligence, unless intention to do so is expressly stated. The reason is that, the stipulation having something besides negligence to apply to, viz., the carrier's liability as insurer, it will not be supposed that the parties intended to cover the carrier's liability for his own negligence, unless that is expressly, or by necessary inference, included. *Canfield v. B. & O. R. R. Co.*, 93 N.Y. 532, 45 Am. Rep. 268; *Kenney v. N. Y. C. & H. R. R. R. Co.*, 125 N.Y. 422, 26 N.E. 626. In England, where a carrier may contract against his own negligence, the law is the same. Beven on Negligence (2d Ed.) p. 1128. The same rule was laid down by the Supreme Court of the United States, before it had decided in *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, on grounds

[14] 170 Fed. 894.

of public policy, that a common carrier could not contract against liability for his own negligence. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465.

"A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordinary care. *The Margaret*, 94 U.S. 495, 24 L. Ed. 146. It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. Unless construed to cover the tug's negligence, the stipulation is meaningless; i. e., an agreement by the tow to assume risks to which she is subject without any stipulation and for which there is no liability at all on the part of the tug." [15]

On rehearing, the Court reaffirmed its holding. The organ of the majority of the Court, Judge Ward, stated that he appreciated keenly that the decision of the majority as to the right of a tug to contract against her own negligence was a departure from previous opinions, and expressed the hope that the matter would be

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[15] The opinion proceeds with a discussion of *The Syracuse*, *supra*, and concludes that Mr. Justice Davis

"* * * must have meant that an agreement by the tow to tow at her own risk should not be construed to cover the tug's negligence. This was the view of Judge Nelson in the court below (*The Syracuse*, 6 Blatchf. 2, Fed. Cas. No. 13,717), who began his opinion with these words:

'One ground of defense set up is that by the contract of towage it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.'"

set at rest in that case by the Supreme Court, but an application for a certiorari was denied.[16]

Following its decision in *The Oceanica*, and before any further pronouncement on the matter by this Court. the Second Circuit consistently held valid and enforceable agreements whereby towers released themselves from liability for damage to the tow occasioned by negligent towage.[17] The highest court of the State of New York also held such release towage agreements valid.[18] In the Fifth Circuit, the District Court for the Southern District of Georgia, in *The Pacific Maru*[19] also held these release towage agreements valid; but in the Ninth Circuit they were held invalid.[20]

The question was again presented to this Court in 1928 in *The Wash Gray*.[21] That was a suit by the owner of a steam tug, the WASH GRAY, to recover the proceeds of insurance on the tug which became a total loss while being towed from Tampico to Galveston by the FREEPORT SULPHUR NO. 1. The towage contract contained the provision that:

"Freeport Sulphur No. 1 will furnish hawser.

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[16] 215 U.S. 599.

[17] *Monk v. Cornell Steamboat Co.*, 198 Fed. 472 (2 C.C.A. 1912); *Ten Eyck v. Director General of Railroads*, 267 Fed. 974 (2 C.C.A. 1920), certiorari denied 254 U.S. 646; *The Energy-Altamaha*, 1926 A.M.C. 917 (D.C. S.D. N.Y. 1922); *The Mercer*, 14 F. 2d 488 (D.C. E.D. N.Y. 1926).

[18] *Graves v. Davis* (C.A. N.Y. State, 1923), 235 N.Y. 315, 1923 A.M.C. 490.

[19] 8 F. 2d 166 (1925).

[20] *Alaska Commercial Co. v. Williams*, 128 Fed. 362 (9 C.C.A. 1904); *Mylroie v. British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C.C.A. 9, 1920), certiorari granted 255 U.S. 566, and case decided on other grounds 259 U.S. 1, which the Court said "makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void;" *Sacramento Navigation Company v. Salz*, 3 F. 2d 759 (9 C.C.A. 1925), certiorari granted 268 U.S. 683, and reversed on other grounds 273 U.S. 326; *The Sea Lion*, 12 F. 2d 124 (D.C.N.D. Cal. 1926).

[21] *Supra.*

> All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up stream and man the tug's pumps. S.S. Freeport No. 1 is not responsible in any way for loss or damage to the Wash Gray".

The insurers contended that the release towage clause violated a warranty in their policy and thereby the insurance was voided. This Court held that the clause did not release the towing vessel from any loss or damage to the tow due to the negligence of the master or crew of the towing vessel, and disposed of the question by referring to *The Syracuse* and stating that: "In view of this state of the law, the towing contract here shown was not a fact material to the risk, * * * "

What this Court meant by its decision in *The Wash Gray* has caused considerable divergence of opinion: on the one hand, the decision has been interpreted as holding that towers are prohibited from contracting against liability for negligent towage; and on the other, that the particular release clause there construed was ineffectual because it did not evidence any clear intent to relieve the tower from liability for the negligence of the master and crew of the towing vessel. The correctness of the second contention is supported by the decision in this Court in *Sun Oil Company v. Dalzell Towing Company*,[21] decided only four years after *The Wash Gray*, wherein Your Honors stated unequivocally that the decisions in *The Syracuse* and in *The Wash Gray* did not go beyond an interpretation of the language of the agreements construed in those cases.[22]

In *Sun Oil Company v. Dalzell Towing Company*

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[21] *Supra.*
[22] See Footnote No. 11, *ante*, Page 5.

there was involved a collision of a tanker in tow of three Dalzell tugs in the harbor of New York. As was customary on the East Coast, the master of one of the Dalzell tugs went on the bridge of the ship to act as pilot. New York is not a compulsory pilotage port, but by reason of the heavy harbor traffic and the peculiar situations which are met in navigation there, invariably the master of one of the tugs towing an ocean going vessel pilots her through the harbor. In this case the towage was performed under a so-called "pilotage clause" [23] which constituted the master of the tug the servant of the tow in the performance of the towage service. The ship having been damaged through the negligence of the tug master-pilot, litigation ensued in the Southern District of New York wherein the pilotage clause was plead as a defense. In the District Court, Judge Knox, quite experienced in admiralty matters, upheld the validity of the clause. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the case was heard by three eminent judges familiar with the law of admiralty, Judges Swan, Learned Hand and Augustus N. Hand, who unanimously upheld its validity and differentiated the case from *The Syracuse* and *The Wash Gray* because of the differences in the import of the release clauses involved.[24] This Court granted certiorari and unanimously held that the validity of the clause "cannot reasonably be doubted". Your Honors pointed out that the service to be rendered under the agreement was not a common carrier service

[23] " 'When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.' " (287 U.S. 291, 292).

[24] See note No. 11 *ante* page 5.

or a bailment, and that "There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence".

The majority of the District and Appellate Federal Courts have construed the *Sun Oil Company-Dalzell Towing Company* Case as authority for the proposition that towers may contract against liability for negligent towage and that the only question involved in each case is whether the release towage clause effects such a release. This clearly appears from a review and analysis of the decisions of the District and Appellate Federal Courts since the *Sun Oil Company-Dalzell Towing Company* decision.

In the Third Circuit [25] and in the Fourth Circuit [26] the Courts have declared a release towage clause of proper import valid to release a tug from its negligence. The United States Court of Appeals for the Ninth Circuit will probably reach the same result when the matter is presented to it again.[27]

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[25] *Texas Co. v. Lea River Lines, Inc.*, 206 F. 2d 55 (C.A. 3, 1953).

[26] *The St. Francis*, 72 F. Supp. 50 (D.C. Md. 1947).

[27] A somewhat analogous case is *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F. 2d 531 (C.A. 9, 1941), a suit to recover damages resulting from the loss of a yacht destroyed while in the custody of the Hall-Scott Motor Company having its motor replaced. The Court took note (122 F. 2d 535) of *The Wash Gray* as "unquestionably" settling the rule "that 'a clause in a towage contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow, does not release the former from loss or damage due to the negligence of her master or crew' ". The Court then reviewed *Sun Oil Company - Dalzell Towing Company* (122 F. 2d 536) and quoted therefrom extensively; then reviewed the jurisprudence of the Supreme Court in carrier cases involving non-common carrier accidents, and reached the conclusion (122 F. 2d 537): "It follows from the foregoing authorities that a contract exempting one of the parties thereto from the results of his negligence is legal unless public policy forbid such contract."

The Sixth Circuit in *Walter G. Houghland, Inc. v. Muscovalley*[28] held that where towing was being performed at the "owner's risk", that contract did not release the tower from liability for negligent towage. We submit that there is nothing in that opinion which indicates that the Court would not have held valid either the pilotage clause or a release clause which clearly evidenced the intention to release the tower from liability for damage to the tow from negligent towage, though, as to the latter the contrary view has been taken by others.

The Fifth Circuit has unequivocally held that release towage agreements are not against public policy, are valid and enforceable, and has upheld their validity in those cases where the clause evidences a clear intent to effect such a release.[29] The jurisprudence in the Fifth Circuit culminated in the decision of the United States District Court for the Eastern District of Louisiana in the instant case, wherein the District Judge held invalid that portion of the release towage clause which released the tug from negligent navigation but held valid the second portion, which was a pilotage clause.[30] On appeal the Court held both portions of the release clause valid[31] and that is this case, which is now before Your Honors for review.

In the Second Circuit, in a number of cases, the validity of the release towage clause was upheld.[32]

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[28] 184 F. 2d 530 (C.A. 6, 1950).

[29] *Hendry Corp. v. Aircraft Rescue Vessels*, 113 F. Supp. 198 (D.C.E.D. La. 1953); *Mengel Co. v. Inland Waterways Corp.*, 34 F. Supp. 685 (D.C.E.D. La. 1940).

[30] For the wording of the clause see Note 6, *ante*, Page 2.

[31] 211 F. 2d 401 (1954).

[32] *The Harris No. 2*, 45 F. Supp. 282 (D.C. N.Y. 1942); *The Melvin and Mary*, 23 F. Supp. 398 (D.C. N.Y. 1938); *The John J. Feeney*, 3 F. Supp. 270 (D.C. N.Y. 1933); *The Primrose*, 3 F. Supp. 267 (D.C. N.Y. 1933).

Finally, in 1954, the United States Court of Appeals for the Second Circuit in *North River Barge Line v. Chile S.S. Co.*[33] held that the effect of *Sun Oil Company-Dalzell Towing Company* was to accept the doctrine of *The Oceanica*, saying:[34]

> "Remembering that the operator of a tug is not a public carrier and that, without this agreement against liability, McAllister could and would have refused to undertake towage through the river when ice-laden, we think the agreement valid. See *The Oceanica*, 2 Cir., 170 F. 893. A contrary *dictum* in *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382, was approved in *Compania de Navegacion v. Firemen's Fund Ins. Co.*, 277 U.S. 66, 73-74, 48 S. Ct. 459, 72 L. Ed. 787. But we think that *Sun Oil Co. v. Dalzell*, 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311, is to be taken as, in effect, accepting the doctrine of *The Oceanica*. See also *Graves v. Davis*, 235 N.Y. 315, 319-320, 139 N.E. 280; *Nielson v. United States*, 2 Cir., 209 F. 2d 958, affirming, D.C., 112 F. Supp. 730; cf. *Santa Fe P. & P. Railway Co. v. Grant Bros.*, 228 U.S. 177, 188-189, 33 S. Ct. 474, 57 L. Ed. 787."

Accordingly, it amply appears that not only is there no "rule" which prohibits a tower from contracting to be released from liability for his negligence, but that by the weight of judicial authority such release towage clauses are valid and will be given full effect according to their import.

Further, it appears that there is no reason in law or public policy why such release towage agreements should be prohibited.

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[33] 213 F. 2d 882 (C.A. 2, 1954).
[34] 213 F. 2d 884.

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The Public Policy

Petitioners contend vigorously that it is against public policy to permit a tower to contract against liability for damage to the tow arising out of negligent towage. It is our contention that not only is such public policy non-existent, but, on the contrary, the highest public policy is found in enforcing such contracts as written.

Initially, the relation of a tug to its tow must be considered. While at common law towing was a common calling,[35] as early as 1876 this Court in *The Margaret*[36] held that a tug is not a common carrier and that the laws of common carriage have no application to a towage contract. In 1932 in *Stevens v. The White City*,[37] generally recognized as the leading case on the subject, this Court reiterated that a tug is not a common carrier and held that a tug is not the bailee of its tow or its cargo. In *Sun Oil Co. v. Dalzell Towing Co.*,[38] this Court again reiterated its holding that in rendering a towage service a tower is not a common carrier or bailee or bound to serve or liable as such. These major premises of law—that a tug is neither a common carrier nor a bailee of its tow or liable as such—are so firmly embedded in our jurisprudence that we do not labor the point. If a tug is not a common carrier or bailee of its tow or liable as such, what, then, is the "public policy" which forbids a tower and the owner of a tow to contract with each other that the tower shall be relieved from liability for loss of or damage to the tow occasioned by the towboat's negligence? On the contrary, the highest public policy is found in the en-

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[35] *Sproul v. Hemmingway*, 14 Pick., Mass., 1, 6, 25 Am. Dec. 350, cited in *Cornell Steamboat Co. v. United States*, 321 U.S. 634.
[36] 94 U.S. 494 (1877).
[37] 285 U.S. 195 (1932).
[38] 287 U.S. 291 (1932).

forcement of the contract which was actually made, as this Court has had occasion to point out in no uncertain terms.

Forty years ago, in one of the most important cases on this subject, a landmark in the jurisprudence, *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co.*,[39] this Court had before it the question of the right of a common carrier to contract against liability for its negligence when engaged in activities not within the scope of common carriage. Your Honors held the clause in the contract releasing the Railway Company from liability for its negligence entirely valid and, speaking of the public policy involved, said:

> "The parties, then, were free to make their own bargain as to this transportation, and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made. Undoubtedly, it is not to be lightly concluded that the railroad company has been relieved from liability for its neglect, but, on the other hand, if this was the agreement as fairly interpreted, it is not to be arbitrarily overridden. The parties were on equal footing. The risk of loss or damage to the grading outfit or supplies from any cause, while being transported over the line of the railway company, could be assumed by one party or the other, as they saw fit. This risk was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the railway company. We are not at liberty to revise the contract, and the question simply is whether the stipulation against

[39] 228 U.S. 177 (1913).

liability, in view of the reduced rates, covered all losses,—those which might be due to the carrier's neglect, as well as others."

Again, in *Sun Oil Co. v. Dalzell Towing Co.*,[40] this Court in discussing the pilotage clause in the light of public policy, said:[41]

> "The validity of its applicable provision cannot reasonably be doubted. So far as concerns the service to be rendered under the agreement, respondent was not a common carrier or bailee or bound to serve or liable as such. Towage does not involve bailment, and the services covered by the contract were less than towage. *Stevens v. The White City*, 285 U.S. 195, 200, 52 S. Ct. 347, 76 L. Ed. 699. There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence. *N. Y. C. Railroad Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 440, 9 S. Ct. 469, 32 L. Ed. 788. Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made.' *Santa Fe, P. & P. Rail-*

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[40] *Supra.*

[41] 287 U.S. 294.

way Co. v. Grant Brothers, 228 U.S. 177, 188, 33 S. Ct. 474, 478, 57 L. Ed. 787."

The Court remarked that under the circumstances it would be "unconscionable" for the owner of the tow "upon occurrence of a mishap to repudiate the agreement upon which it obtained the service".

We have, therefore, the unequivocal holding of this Court that where there is no question of common carriage involved, "the highest public policy is found in the enforcement of the contract which was actually made". In opposition to this pronouncement, Petitioner cites [42] from Judge Coxe's dissenting opinion in *The Oceanica* [43] that it ought to be against public policy to permit a vessel to contract against her own fault because "to allow her to do so begets recklessness, carelessness and neglect"; and that the same reasons for prohibiting such a contract apply as in the case of common carriage, though perhaps not to the same extent. Though we have great respect for Judge Coxe's opinion, nevertheless, it is the opinion of only one judge, not only wholly unrealistic when viewed in the light of the custom which has prevailed for a hundred years in the United States, but also contrary to decisions of this Court and to the weight of authority in the other courts of this country. Time and time and time again the courts of this country have put their stamp of judicial approval upon contractual releases from liability for negligence in non-maritime as well as in admiralty matters, and yet, every one of them was subject to the same theoretical objection, that to permit a man to contract against his negligence begets recklessness, carelessness and neglect. How-

[42] Petitioner's brief, page 5.

[43] *Supra*.

ever, experience has proven that this objection remains theoretical and has not been real. Why should a towage contract be differentiated from any other service contract which does not involve common carriage or bailment, such as well-drilling, building and construction work, and a host of others wherein the courts have sanctioned agreements relieving from liability for negligent conduct?

As this Court aptly remarked in the *Sun Oil Co.-Dalzell Towing Co.* Case [44] there was nothing to suggest there that the parties were not on equal footing or that they did not deal at arm's length. The same is equally true here. Towers, as a class, do not differ greatly if at all from those for whom they perform towage services, as a class. Towers as a class range from the innumerable small operators, many of whom own but a single tug and in many instances operate it themselves, up to the numerous large operators who own and operate large fleets of tugs. The same diversification is found among those for whom towages are performed. They range from the innumerable small operators owning one barge up to the numerous large operators owning fleets of barges or steamships. We reiterate, therefore, that as a class, towers do not differ greatly if at all from those for whom they perform towage services as a class.

Of course, this is not to say that in a particular case the bargaining advantage does not lie with the tower or in other cases with the party for whom the towage is to be performed; but because in a particular case one party had an advantage at the bargaining table is no reason why the contract entered into after dealing at arm's length should not be enforced. The concern of the courts is in protecting the legitimate interests of towers

[44] *Supra.*

as a class as opposed to the interests, as a class, of those for whom they perform towage. The rule necessarily must be one applicable to large vessels and to barges, to single tugs and large fleets of tugs, and for towages on rivers, in harbors and on the high seas, and if the right to contract is limited as to any single operator in either class, it must be limited as to all.[45]

Furthermore, obviously, rates charged for towage necessarily take into consideration the risk assumed by the tower and the costs to tower of his insurance.[46] Whatever insurance is available to towers is equally available to those for whom towage is performed, and it may be assumed fairly that when a contract of towage has been entered into, the party who risks the liability for damage to the tow through negligent towage, whether it be the tow's owner or the tower, insures that risk. Such is the normal action of businessmen. Accordingly, the question to a large extent devolves into this: If a tower does not exempt himself from liability he must add to the price of the towage the premium on the insurance; if he exempts himself, then the party for whom the towage is performed secures the towage at a lesser price and insures the risk at his expense. Having agreed where the risk shall lie and having agreed that the tower shall be exempted from liability so that the tower does not protect himself with insurance, it would be "unconscionable" for the owner of the tow "upon occurrence of a mishap to repudiate the agreement upon which it

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[45] Judge Barrett, District Judge of the Southern District of Georgia in *The Pacific Maru*, 8 F. 2d 166, 173 (1925).

[46] "This risk [of loss] was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the railway company". *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177. And Judge Barrett in *The Pacific Maru, supra*, expressed the opinion that if a tower be denied the right to contract against liability for damage to the tow occasioned by negligent towage "it may well be that the increased rates for service will be so great as to severely impair the commerce of the country". (8 F. 2d 173).

obtained the service"[47] and to visit liability upon the tower either for the benefit of the owner of the tow or perhaps, as in many cases obviously occurs, for the benefit of the insurer of the tow who has been paid a premium to undertake that liability.

Petitioners say[48] that there is a "practical universality of the practice among towers of inserting in their towage contracts stipulations against liability for their own negligence", said by them to be demonstrated "both by the motion of *amici curiae* in the Court of Appeals" which they reprint as an appendix to their brief and "by the large number of cases in the various courts involving such stipulations" cited in their brief and the brief to the two companion cases here. While obviously one desiring to have towage performed is somewhat restricted in his choice of a tower who will perform the towage without being relieved from liability for damage to the tow occasioned through negligent towage, there is nothing in the record, nor do we conceive it to be a fact that there are not many towers who will perform towages upon the basis of their legal liability for damage to the tow, or even assume complete liability for the safety of the tow, howsoever damaged, provided, of course, that they are sufficiently remunerated for the service. However, even if we assume, though certainly we do not concede, that there is a "practical universality" in the practice of inserting in towage agreements clauses releasing the tower from liability for damage to the tow resulting from negligent towage, we submit that that is no reason for declaring the practice invalid. If, as must be admitted, a private or contract tower is under no obligation to perform a towage service on any basis, then on

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[47] *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S., 291, 295.

[48] Note 22 on Page 12 of their brief.

what theory can he be required to perform it on the basis of assuming liability for damage to the tow occurring through negligent towage? We reiterate: the contract of towage is no different from any other contract to perform a service which does not involve common carriage or a bailment. As an example, suppose that some oil well drillers refused to drill an oil well for a customer unless the customer assumed liability for all damages arising from negligent drilling. Is not the answer to one dealing with such a driller: accede to the well driller's requirements, find another driller amenable to your requirements, or drill the well yourself? Suppose that certain cleaning establishments refused to clean suits of clothes unless the customer assumed liability for damage to the garments resulting from the cleaning. Would not that require the customer to accede to the cleaner's demands, seek out another cleaner who was less demanding, or clean this garment himself? Is not the same true of towage?

Lastly, petitioners urge[49] that the rule that towers are not permitted to relieve themselves of liability for damage to the tow caused by negligent towage has existed for so long a time that it should not now be disturbed "especially in the light of Congress' abstention from alteration of the rule in the course of the intervening regulatory activities in the field"; and they add that "it is worthy of particular note in this connection, that Congress has never seen fit to encourage the towage industry by extending to towers the privileges, for exoneration from liability, granted to cargo vessels, for encouragement of that branch of maritime commerce, by the Harter and Carriage of Goods by Sea Acts."

This contention is completely fallacious. The im-

[49] Petitioner's Brief, page 11.

munities granted by the two cited Acts are not to "cargo vessels" but to common carriers by water. It is elementary that this left private carriers by water in the same situation as other private carriers: free to contract for such immunities as they saw fit, untrammeled by statutory prohibition. Since there never has existed any rule that a private carrier or tower could not contract against his liability, obviously it would be impossible for Congress to alter a non-existent rule. Is not the opposite true inasmuch as Congress has never seen fit, except as to that towage subject to Part III of the Interstate Commerce Act, to prohibit a tower from exempting itself from liability for negligent towage, notwithstanding the fact that it has leveled that prohibition against common carriers by the Harter Act [50] and by the Carriage of Goods by Sea Act? [51]

The absence of congressional action *quoad* release towage agreements led Judge Barrett in *The Pacific Maru* [52] to express the opinion that no prohibition should be leveled at them in the absence of congressional action. He said there:

> "So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress."

At the time that Judge Barrett expressed this opinion, 1925, he was, of course, correct: Congress had not at that early date declared any policy whatsoever with regard

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[50] Sections 1 and 2. Post, Appendix, Page 35.
[51] Section 3. Post, Appendix, Page 36.
[52] 8 F. 2d 166, 173.

to towage or sought to regulate that field. However, fifteen years later, in 1940, Congress regulated towage in the Transportation Act of 1940,[53] commonly known as Part III of the Interstate Commerce Act.

Considering the pertinent provisions of that act, this Court in *Cornell Steamboat Company v. United States*,[54] held that the Cornell Steamboat Company, which operated towboats for hire on the Hudson River and in and about New York harbor, though the tugs carried no cargo, but moved scows, barges and similar vessels belonging to others, which themselves usually carried cargo, were "water carriers" within the meaning and intendment of Part III of the Interstate Commerce Act. The Court recognized in its Footnote No. 2[55] that Section 320 (d) of Part III of the Act specifically provided: "Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part."

What is the net result of this decision? A common carrier subject to Part III of the Interstate Commerce Act, when performing a towage of a barge in a movement not specifically exempted under the act, has the benefit of the exemption of Section 3 of the Harter Act,[56] which relieves the carrier from liability "for damage or loss resulting from faults or errors in navigation or in the management of said vessels". On the other hand, the private carrier, whether or not subject to Part III

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[53] 49 U.S.C., 901, *et seq.*
[54] 321 U.S. 634 (1944).
[55] 321 U.S. 637.
[56] Post, Appendix, Page 36.

of the Interstate Commerce Act, not only does not have the benefit of the exemption from liability contained in the Harter Act and the Carriage of Goods by Sea Act, but, according to the Petitioner's theory, he would not be permitted to contract for such exemption. This would produce the anomolous situation of a common carrier having less liability than one not engaged in common carriage.

The incongruity of this situation is best demonstrated by this example: If Mississippi Valley Barge Line Company, a certificated common carrier subject to Part III of the Interstate Commerce Act, towed a barge of steel products for a steel company between points A and B, Mississippi Valley Barge Line Company automatically and by operation of law would be afforded the exemption from liability for loss or damage provided by Section 3 of the Harter Act. Nevertheless, if in the same tow, Mississippi Valley Barge Line Company undertook to transport between the same points a cargo of petroleum products in a tank barge certificated by the Coast Guard (and, therefore, exempt from Part III of the Interstate Commerce Act,[57]) not only as to that barge the Mississippi Valley Barge Line Company would not have the benefit of the exemption provided by Section 3 of the Harter Act, but, if the contention of the Petitioner here prevails, it could not even contract for such exemption. We would, therefore, be presented with the example of a tower with a different liability to two different barges in the tow and unable by contract to attain a uniform liability. Obviously Congress did not and could not have intended to bring about any such incongruity.

Petitioner, in the "Conclusion" to its brief, invokes

[57] Section 303 (d); 49 U.S.C. 903 (d).

the doctrine stated by this Court in *United States v. Atlantic Mut. Ins. Co.*:[58] Congress and not shipowners should change a positive rule. Of course, there this Court had under consideration the long existing general rule continued in the Harter Act and in the Carriage of Goods by Sea Act,[59] that common carriers cannot stipulate for immunity from their own negligence, and held that the so-called "both-to-blame clause" amounted to an attempt by a common carrier to stipulate against the effects of its own negligence. Petitioner's attempted application of that doctrine is specious here where, as pointed out, no rule has been created either by jurisprudence or by statute prohibiting contracts whereby the tower exempts itself from liability for damage to the tow caused by the negligence of the towboat (except as to common carriers performing towage subject to Part III of the Interstate Commerce Act).

It amply appears, therefore, that common carriers performing towages subject to Part III of the Interstate Commerce Act are exempted from liability for negligent towage by virtue of the provisions of the Harter Act or the Carriage of Goods by Sea Act, as appropriate, and that there is not only no rule of public policy or statutory provision which prohibits a private carrier or tower from entering into a contract exempting itself from liability, but the highest public policy lies in permitting a tower not subject to Part III of the Interstate Commerce Act so to do, thereby placing itself on a parity with the common carrier.

The English Rule

While the English jurisprudence is in no degree binding on this Court, the determination by an English

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[58] 343 U.S. 236, 242 (1952).
[59] Post, Appendix, Page 36.

court of any matter of admiralty and maritime jurisprudence should be highly persuasive. We do not here attempt to review the voluminous English jurisprudence on the subject, but we refer to one case because of the striking similarity between the questions there and here presented.

In *The President Van Buren*[60] the plaintiff, the Port of London Authority, claimed for damage sustained by their Tug SIRDAR in a collision between the tug and the PRESIDENT VAN BUREN. The collision took place while the tug was engaged in assisting the PRESIDENT VAN BUREN inward bound from New York up the Thames. The towage was being performed under a contract, the pertinent part of which is recited in the extract from the opinion hereinafter quoted. The defendant, the United States Shipping Board, counterclaimed for the damage sustained in the collision by the PRESIDENT VAN BUREN, alleging that the collision was occasioned by the negligent navigation of the Tug SIRDAR and thereby called into question directly the validity and meaning of the release towage agreement. The case was heard on two preliminary questions: first, the validity of the agreement, and second, whether, if the Tug SIRDAR was guilty of negligent navigation, the United States Shipping Board was liable for all damage to the dock and to the SIRDAR. Discussing these two preliminary questions, Mr. Justice Hill said:

> "The first is whether the agreement set up by the plaintiffs is valid and not void as against public policy. The second is, assuming the agreement to be valid, whether, if the collision was solely caused or partly contributed to by negligence on the part of those in charge of the *Sir-*

[60] 16 N.S. Aspinall's Maritime Cases 444 (1924).

dar, the defendants are nevertheless liable for the whole of the damage occasioned by the collision. The contract which was sent in and signed by Moxon, Salt, and Co. Limited, as agents for the owners of the *President Van Buren*, on the face of it, asked for the supply of tugs on the terms and conditions endorsed, which terms and conditions they agreed to be bound by. The conditions endorsed, so far as material, were in the following terms: 'The masters and crew of the tugs and transport men shall cease to be under the control of the Port Authority during and for all purposes connected with the towage or transport and shall become subject in all things to the orders and control of the master or person in charge of the vessel or craft towed or transported and are the servants of the owner or owners thereof who hereby undertake to pay for any damage caused to any of the Port Authority's property or premises and to bear, satisfy and indemnify the Port Authority against liability for all claims for loss of life or injury to person or loss or damage by collision or otherwise to the vessel or to or by the vessel or craft towed or to or by any cargo or other thing on board the same or to or by any vessel cargo or property of any other person or persons or to the tug or tugs supplied, whether such damage loss or injury arise or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of any of such masters, crew or men or any servant of the Authority or any other person or from or by any defect or imperfection in the tug or tugs supplied. * * * '

"Before considering the conditions, I should mention that the Port of London Authority are in control of the docks; that they own or hire the tugs used in the docks, the *Sirdar* being one of the tugs owned by them; that they supply all tugs for dock work and will not allow any outsider to do the work; and that wherever they do

supply tugs they insist upon the terms contained in this contract. The United States Shipping Board, the defendants, had an appropriated berth in the Tilbury Dock and were in the habit of using the Port Authority's tugs in that connection; and the *Sirdar* was one of the tugs they usually employed.

"On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on this matter is that which I have already expressed, namely, that the English law, in my view, very fortunately regards business men as capable of knowing their own business and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like. In truth, as we know, a contract in this form, or in a practically similar form, has become for a good many years past of almost universal use by tug owners; and whether a tug owner supplies a tug on these terms or on terms which reserve liability to himself (where he does it) it is only a question of price. If he is to have no liability, he can do the work very cheaply; if he is to run all the risks, then of course his reward must be sufficient not only to compensate him for the work he does, but to cover the insurance and, in fact, all the risks he runs. I can conceive no principle of public policy which should lead the courts to say: 'We ought to step in and say "This or that contract ought not to be made by competent people,"' when the people making it are competent people. It is said that the Port of London Authority is a monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, you cannot employ any other tugs than the Port of London Authority's tugs. There it is. If you do not like these terms and if they are too onerous, nobody forces you to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to

be so clear that, if you are talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it.

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"The form of contract aims, in the first place, at making the master and crew of a tug for the time being the servants of the ship which is being towed; in the second place its aim is to deal with damage caused to the Port Authority's own property; and in the third place its aim is to deal with liabilities which may be incurred by the Port Authority by reason of damage to the other people's property or to life. If the first section, which begins: 'The masters and crews of the tugs' and ends 'are the servants of the owner or owners' of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide, because it will be that the Port of London Authority contemplates; and if it effectually makes the masters and crews of tugs servants of the ship which is being towed—servants for the time being—then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants; and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow.

"I have considered Mr. Batten's criticism. I think that clause does do what it sets out to do; and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. I do not think that can be limited in the way Mr. Batten suggests. I think it provides that for the purposes of the towage and for all purposes connected with the towage they are the

servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar*—the master and crew of the *Sirdar*—the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot themselves claim in respect of any damage done to the *President Van Buren.*

"I think it is also made quite clear by what follows that the owners of the tow undertake to pay for any damage caused to any of the Port of London Authority's property or premises. Thinking, as I do, that a portion of the conditions deals with the Port of London Authority's own property and is in contrast with the following part which deals with the liability of the Authority to other people, I see no reason for excluding from the general description of the Port of London Authority's property their tugs; and, in my view, therefore, the owners of the tow, the *President Van Buren*, have undertaken to pay for damage caused to the Port of London Authority's property, the tug *Sirdar.*

"In the third portion of the conditions they likewise undertake to bear loss or damage by collision to the vessel towed; and that includes all damage to the *President Van Buren.*

"I must therefore answer the issues by finding (1) that the agreement is valid; and (2) that, if those on board the *Sirdar* were negligent by solely causing the collision or contributing to the collision, the defendants are liable to the plaintiffs for the whole of the damage occasioned by them. I think that is the right way to answer the question as it is submitted; and, that being so, there will be judgment for the plaintiffs on the claim and counterclaim."

It therefore appears that the English view taken of this subject is the same as has been taken by this Court

as to the pilotage clause and by the majority of the District and Appellate Federal Courts with regard to the clause releasing a tower from liability for negligent towage.

The Release Towage Clause Here Under Consideration Is Valid

The Court of Appeals for the Fifth Circuit in the instant case held valid both portions of the release towage clause here under consideration.[61] The Court held, pursuant to views which we had urged in *amicus curiae* brief filed there, that both paragraphs of the clause read as a whole showed a clear intent by the tower to relieve itself from liability for damage to the tow caused by the towboat's negligence; that, there being no question as the intent of the parties, The SYRACUSE and The WASH GRAY were distinguishable because of the differences in the wording of the clauses therein interpreted; and accordingly the clause in the instant case was held valid. The Court also upheld the "pilotage clause".

The Petitioner not only attacks the decision upholding the release towage agreement as a release from negligence,[62] but also attacks the validity of the pilotage clause as applied to this case. The Petitioner would have the doctrine of *Sun Oil Co. v. Dalzell Towing Company*[63] restricted and declared inapplicable to towages of dumb barges. They foundation their argument[64] on an ex-

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[61] This clause is quoted in our note No 6, *supra*, Page 2.

[62] The grounds for attack and the validity of the clause have been discussed hereinbefore.

[63] *Supra*.

[64] Their brief, page 7.

cerpt [65] from *Stevens v. The White City* [66] and the treatment of the tower's "control" of the tow in Judge Clark's concurring opinion in *B. Tarecamo Towing Corporation v. United States* [67] and in the opinion on rehearing in *Sternberg Dredging Company v. Moran Towing & Transportation Company.* [68]

The excerpt from *Stevens v. The White City* is lifted from context, and for a full understanding of the Court's holding, the remainder of the same paragraph must be considered. We add it here:

> " * * * The owner of the Drifter did not surrender to respondent any right of control that does not pass in virtue of a contract merely for towage. The fact that the man put aboard by the builder did not remain to the end or that the owner did not choose to keep some one on the tow is immaterial."

It therefore appears unequivocally that the DRIFTER, the tow whose damage was the basis for the *Stevens-White City* litigation, was unattended and wholly within the control of the towing vessel. Because of this fact, Petitioner's argument that the *Stevens-White City* doctrine does not extend to an unmanned barge is founda-

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[65] For the ready reference of the Court, the excerpt is reproduced here as printed in the opinion:

> "The tug does not have exclusive control over the tow, but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency, the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. * * * ".

[66] *Supra.*

[67] 127 F. 2d. 1001 (C.A. 2, 1942).

[68] 200 F. 2d. 603 (C.A. 2, 1952).

tioned on quicksand. The references to *B. Turecamo Towing Corporation v. United States*[69] and *Sternberg Dredging Co. v. Moran Towing & Transportation Company*, do not in any way affect the *Stevens-White City* doctrine as pronounced by this Court.

Suffice it to say that there has been no reported case that we have seen which undertakes to restrict the validity of the pilotage clause approved in *Sun Oil Co. v. Dalzell Towing Co.* so as to make it inapplicable to a dumb barge, and there does not appear to be any possible reason for so restricting it when one considers the fact that the DRIFTER[70] was an unmanned vessel.

CONCLUSION

In conclusion it is submitted that the towage release clause here under consideration is valid and relieved the Inland Waterways Corporation of liability for the loss of the BISSO NO. 9, and that the decree of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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New Orleans, Louisiana,
December 14, 1954.

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[69] Before the Court of Appeals only on a question of pleading.
[70] The damaged tow in the *Stevens-White City* litigation.

APPENDIX

Sections 1, 2 and 3 of the Harter Act

46 U.S.C. 190. Stipulations relieving from liability for negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. (Feb. 13, 1893, c. 105, § 1, 27 Stat. 445.)

46 U.S.C. 191. Stipulation relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. (Feb. 13, 1893, c. 105, § 2, 27 Stat. 445.)

46 U.S.C. 192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. (Feb. 13, 1893, c. 105, § 3, 27 Stat. 445.)

Carriage of Goods by Sea Act

46 U.S.C. 1303 (8). Limitation of liability for negligence

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. (Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.)

46 U.S.C. 1304. Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(*l*) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(*o*) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.